Supreme Court, U.S.
FILED

04 517 JUN 7 - 2004

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

CHRISTOPHER VILLAGE, L.P. and WILSHIRE INVESTMENTS CORP.,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

E. Grey Lewis
Counsel of Record for Petitioners
1825 I Street, N.W., Suite 400
Washington, D.C. 20006
(202) 429-2082

June 7, 2004

QUESTIONS PRESENTED

Christopher Village, L.P. ("Christopher Village") sued the United States Departmentof Housing and Urban Development ("HUD") in United States District Court for equitable relief from HUD's New Enforcement Policy. The Fifth Circuit issued a declaratory judgment that HUD's New Enforcement Policy was illegal. *Christopher Village, Limited Partnership, et al. v. Retsinas,* 190 F.3d 310 (5th Cir. 1999).

Christopher Village then sued the United States for breach of contract in the Court of Federal Claims and asserted that *Christopher Village, Limited Partnership v. Retsinas*, supra, was *res judicata.* The Federal Circuit held that "[T]he Fifth Circuit lacked jurisdiction over the action for declaratory judgment because the APA did not waive the United States' sovereign immunity for such a suit in district courts" and, thus, "the Fifth Circuit's judgment is void, [and] it is not entitled to preclusive effect, despite the fact that the court's jurisdiction was not challenged on direct review." *Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1327, 1329, 1333 (Fed. Cir. 2004)

The questions presented are:

1. Whether an action against the United States for money damages for breach of contract in the Court of Federal Claims is an "adequate remedy" within the meaning of Section 704 of the Administrative Procedure Act, 5 U.S.C. § 704, so as to deprive the United States District Court and the United States Court of Appeals for the Fifth Circuit of jurisdiction to render a declaratory judgment that HUD's New Enforcement Policy was not authorized by the National Housing Act, HUD's regulations, the Regulatory Agreement, or the Housing Assistance Payments contract.

2. Whether the Federal Circuit has the jurisdiction to declare a final, unappealed declaratory judgment of the Fifth Circuit void.

RULE 29.6 STATEMENT

Petitioners are Christopher Village, Limited Partnership and Wilshire Investments Corp.

Respondent is the United States of America.

Christopher Village, Limited Partnership is not a corporate entity.

Neither Wilshire Investment Corp.nor any subsidiaries or affiliates thereof have issued shares to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

RULE 29.6 STATEMENT.....iii

TABLE OF CONTENTS.....iv

TABLE OF CITED AUTHORITIES.....vi

TEXT OF STATUTES AND REGULATIONS.....ix

PETITION FOR CERTIORARI.....1

OPINION BELOW..... 1

JURISDICTION.....1

STATUTES AND REGULATIONS INVOLVED..... 1

STATEMENT OF THE CASE.....2

Statement of Facts.....2

Proceedings Below.....9

REASONS FOR GRANTING THE PETITION.....14

1. Whether 5 U.S.C. § 704 waives the Government's sovereign immunity so to allow Federal courts to have jurisdiction under 28 U.S.C. § 1331 to review agency action is an issue vital to the administration of justice.....16

2. The Federal Circuit's decision unlawfully relegates victims of an agency's unlawful interpretation of an agreement, contract, memorandum of understanding, or the like, to an action for breach of contract in an Article I court that cannot grant declaratory or any other form of equitable relief.....18

3. The Federal Circuit Has Restored the Pre-Christopher Village Confusion and Allows HUD to Continue Its Illegal Policy.....22

4. The Federal Circuit Decision Rewards and Encourages Litigants to Engage in Deceitful Conduct Designed to Manipulate the Judicial Process and Insulate a Favorable Decision from Review. 25

5. The Decision of the Court of Federal Claims that the Federal Circuit Affirmed Was Not Only Rejected as Arbitrary and Capricious by the United States District Court for the Southern District of Mississippi, but also, Found to Be Not Substantially Justified.....27

6. The Government Has Unlawfully Used Its Sovereign Powers to Avoid the Consequences of Its Having Entered into the Market Place and Shift to Private Parties the Cost of Meeting its Public Responsibilities.....28

7. The Federal Circuit Decision, Unless Reversed, Will Be a Beacon Warning Future Potential Investors Away from Government Programs that Rely on Private Capital.....28

CONCLUSION.....30

TABLE OF AUTHORITIES

Cases

Bowen v. Massachusetts, 487 U.S. 879 (1988).....18-19

Christopher Village, L. P. v. Retsinas, 190 F.3d 310 (5th Cir. 1999).....5, 11-12, 14 19 23, 26

Christopher Village, L.P. v. United States, 360 F.3d 1319 (Fed. Cir. 2004).....passim.

City of Erie v. Pap's A.M., 529 U.S. 277 (2000).....25

Cooke v. United States, 91 U.S. 389, 398, (1875).....28

Duke Power v. Environmental Study Group, 438 U.S. 59, 70-71 (1978).....10, 17

Fusari v. Steinberg, 419 U.S. 379, 390.....27

Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., 535 U.S. 826 (2002).....14-15

Nail v. Martinez, C.A. No. 3:02cv299BN, December 2, 2002.....21,23-24, 27-28

Powell v. McCormack, 395 U.S. 486, 517-18 (1969).....10, 17

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911).....20

Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 124 (1974).....20

Transohio Sav. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 610 (D.C. Cir. 1992).....29-30

United States v. Southland Mgmt. Corp., 326 F.3d 629 (5th Cir. 2003). 17-18

United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953):.....22-23

United States v. Winstar Corp., 518 U.S. 839 (1996).....28

Statutes

Section 704 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704.....passim

Tuicker Act. 28 U.S.C. § 1491.

Section 221(d)(3) Program. Housing and Urban

Development Act of 1968, 12 U.S.C. § 1715z-1.....2

Section 8 of the the United States Housing Act of 1937. 42 U.S.C. § 1437f. 2

Miscellaneous

S. Rep. No. 96-164, 96th Cong. 1st Sess. (1979).....3

Testimony of Nicolas Retsinas Statement, Assistant Secretary for Housing, Department of Housing and Urban Development, before the House Committee on Government

Operations, Subcommittee on Employment, Housing and Aviation, October 6, 1994. 3,4,6

Testimony of Nicolas Retsinas Statement, Assistant Secretary for Housing, Department of Housing and Urban Development, before the House Committee on Government Operations, Subcommittee on Employment, Housing and Aviation, July 26, 1994.....3-4, 6

Testimony of Nicolas Retsinas Statement, Assistant Secretary for Housing, Department of Housing and Urban Development, before the Senate Banking, Housing and Urban Affairs, June 27, 1994.....4-5

TEXT OF STATUTES AND REGULATIONS

The pertinent text of the statutes and regulations at issue in this matter are as follows:

Section 704 of the Administrative Procedure Act, 5 U.S.C. § 704.

5 U.S.C. § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

PETITION FOR CERTIORARI

Petitioners Christopher Village, Limited Partnership and Wilshire Investments Corp. ("Petitioners"), respectfully petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Federal Circuit.

OPINION BELOW

Christopher Village, L.P. v. United States, 360 F.3d 1319 (Fed. Cir. 2004), Appendix at 1a-37a.

JURISDICTION

This petition seeks review of a decision of the Federal Circuit, *Christopher Village, L.P. v. United States*, 360 F.3d 1319 (2004), decided March 8, 2004. This petition was timely filed on June 7, 2004.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 704 of the Administrative Procedure Act, 5 U.S.C. § 704.

STATEMENT OF THE CASE

Statement of Facts

The Property Owned by Christopher Village

Mockingbird Run was a low-income multifamily housing project consisting of 200 units in 30 buildings situated on 15 acres at 1200 Ridgedale Street, Bryan, Texas. It was constructed and financed in the early 1970s, with a mortgage under Section 221(d)(3) of the National Housing Act. 12 U.S.C. § 1715l (d)(3). All of the units were subsidized under the Loan Management Set-Aside Program pursuant to Section 8 of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437f.

Christopher Village, a Texas Limited Partnership, acquired Mockingbird Run through an Agreement of Sale dated June 1, 1983. Wilshire Investments Corp. is the general partner of Christopher Village. Christopher Village and HUD entered into a Housing Assistance Payments Contract under Section 8 and a Regulatory Agreement pursuant to Section 221(d)(3) of the National Housing Act.

HUD's Programs

In 1961 Congress created the Section 221(d)(3) Program. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 201(a), 82 Stat. 476, 498. 12 U.S.C. § 1715z-1. In 1974 Congress authorized the Section 8 Loan Management Set Aside Program ("LMSA Program") by amending the United States Housing Act of 1937. 42 U.S.C. § 1437f.

The Section 221(d)(3) Program assisted "older assisted housing." The LMSA Program subsidized the rent for tenants living in "older assisted housing."

By the early 1980s, it was obvious that the older assisted housing was deteriorating. S. Rep. No. 96-164, 96th Cong. 1st Sess. (1979) 9-10. With low income housing deteriorating, Congress excoriated HUD for having abandoned the program in which property was transferred from non-profit owners to limited distribution partnerships. Congress directed HUD to do all that it could to attract private investment in deteriorating, "older assisted housing."

Under ordinary circumstances, no one would invest private capital in property that was 10-15 years old, needed substantial repairs, required continuing, costly upkeep and maintenance, and, generally, was located in a blighted neighborhood. Congress and HUD were only able to obtain private capital by providing significant tax benefits (which were eliminated in 1986), non-recourse debt, and contractual assurances that the property owner would not be obliged to invest any capital after the initial equity investment.

The mandatory Federal tenant preferences enacted by Congress during the 1980s delivered the coup de grâce to low-income housing:

> The Federal preference rules, initially intended to address the needs of the very poor, has contributed to the malaise of the inner city and FHA assisted housing.

Testimony of Nicolas Retsinas Statement, Assistant Secretary for Housing, Department of Housing and Urban Development, before the House Committee on Government Operations, Subcommittee on Employment, Housing and Aviation, October 6, 1994. ("Retsinas October 6, 1994 Testimony")

> Where a property is predominantly Section 8 the preferences drive down the average incomes of the tenant body and attracted the poorest of the poor

> along with the social pathologies that accompany high concentrations of very, very poor people.

Testimony of Nicolas Retsinas, July 26, 1994, Federal Circuit, Joint Appendix ("FCJA") at 69.

As the proportion of very low income tenants in older assisted housing increased, so did the portion of the rent that was subsidized under the Section 8 LMSA Program. Ultimately, all of the tenants in most older assisted housing projects received Section 8 LMSA rent subsidies. In older assisted housing, 80 to 90 percent of the gross rental income, or more, was paid by HUD pursuant to the terms of a Housing Assistance Payments Contract ("HAP Contract") between HUD and the owner of the project pursuant to Section 8. However, "Loan Management Set Aside (LMSA) Section 8 . . . . produced, in concert with the Federal preferences, a tenant body with income at the lowest of the low." Retsinas, October 6, 1994, Testimony.

As Assistant Secretary Retsinas also testified:

> We are also talking about projects which are aging. Most are between 13 and 25 years old. We know that by the time a building is 20 years old, major systems need repair and replacement. Buildings cannot be expected to last forever.

Retsinas, October 6, 1994, Testimony

As Assistant Secretary Retsinas further explained:

> [O]ur portfolio analysis also revealed that a significant percentage of our so-called "Older Assisted" properties -- typically built beginning in the 1960s -- are in distressed condition. The reason is not just that these are older properties. Federally imposed rent formulas dictate how much owners can charge tenants to live in these units. We provide additional Section 8 operating support -- but

> typically not enough to support or encourage needed rehabilitation.

Retsinas, June 27, 1996 Testimony, FCJA at 86.

Assistant Secretary Retsinas described the etiology of HUD's New Enforcement Policy -- no money: "The Department does not currently have the ability to pay for needed repairs." *Id.*

HUD'S Response to Lack of Money: a Nationwide Policy of Extortion

HUD's official position prior to the emergence of its New Enforcement Policy was clear. It was expressed in a letter dated October 21, 1994, signed by Dean K. Reger, Deputy Director, Office of Multifamily Housing Management, HUD:

> The Department does not require owners to make outright cash gifts to the projects they own. After final endorsement of a mortgage, there is no requirement of owners to provide additional funds to a project.

In its answer in *Christopher Village v. Cisneros*, Civil Action No. H-95-5005, HUD admitted that after the final endorsement of the mortgage the owners are not required to provide additional funds to a project. Answer 21. However, lack of money caused HUD to change this policy.

In response to the lack of money, as the Fifth Circuit later held, HUD "forced [property owners] either to default or, as HUD well knew, to seek additional equity or debt financing without assurance that these investments would be recouped." *Christopher Village, L. P.. v. Retsinas,* 190 F.3d 310, 317 (5th Cir. 1999).

In response to a suggestion that HUD, rather than the owner, fund some portion of the repair expenses, Helen Dunlap, Deputy Assistant Secretary for Multifamily Housing and a key policymaker, succinctly expressed the policy, the reasons for the policy, and the repercussions to property owners who did not conform to that policy: "you must be kidding. we don't do this anymore and have no source. how many owners who [sic] we have forced into foreclosure this year would scream unfair." E-mail from Helen M. Dunlap to Geoffrey L. Patton, FCJA at 96.

Assistant Secretary Retsinas explained that not only was there no money for repairs, but also there was no money for capital improvements. The traditional "tools" no longer existed. Retsinas, July 26, 1994 Testimony, FCJA at 69.

> The assisted housing inventory is in crisis. There currently exists no capital grant repair program which can be targeted at an assisted property with or without mortgage insurance. We have found that, in the absence of other capital funding tools, lack of such a repair program leads to further deterioration of the properties.

Id.

HUD's policy change was dictated by the highest levels of the Department. On October 6, 1994, Assistant Secretary Retsinas announced the formation of HUD's "Special Workout Assistance Teams," described by HUD as SWAT:

> In 18 days, 24 of our most knowledgeable, capable professionals -- who have committed an entire year to this effort -- will be brought together here in Washington for training and orientation.
>
> Retsinas, October 6, 1994, Testimony

The SWAT Training Manual that was distributed to these trainees explicitly described HUD's New Enforcement Policy and the means by which it would be effectuated. SWAT

Training: Special Workout Assistance Teams" (March 1996) ("SWAT Training Manual"), FCJA at 184-211. The SWAT Training Manual contains step-by-step procedures prepared by HUD Headquarters that must be followed and the letters that must be sent to property owners and the mortgagee in order for HUD to take the property. *Id.* All that HUD's SWAT members need do is fill in the blanks, sign, and mail the letters.

Nancy Christopher was HUD Deputy Assistant General Counsel for Enforcement and worked closely with SWAT. On May 21, 1997, she delivered a speech at an American Bar Association Workshop on HUD Enforcement, attended by HUD attorneys and attorneys in private practice from around the Nation. FCJA at 135-41. She explained that:

> The regulatory agreement contains a multitude of contract obligations. The one that we are focused on principally is the obligation of the owner to maintain the mortgage[d] premises in good repair and working condition.

FCJA at 138.

> HUD is prepared to provide the owner with the corrective opportunity of thirty days under the regulatory agreement and if the owner does not come in with a funded [MIO] plan which is our normal method of correction, HUD will declare the regulatory agreement in default . . . .

FCJA at 138.

According to Ms. Christopher, "It is HUD's position and will proceed to enforcement [sic] that it is the owner's obligation to maintain and replace capital items as they come due and payable with no infusion of HUD capital. We will abate Section 8 contracts." FCJA at 140.

In its SWAT Training Manual, HUD noted that many subsidized housing projects provide the owner with no cash

flow, no tax benefits, and have no residual value. "This painful reality may make it difficult for HUD to secure additional owner contributions to the project . . . " SWAT Training Manual, FCJA at 210.

Nonetheless, as the SWAT Training Manual describes, SWAT is able to force property owners to make equity contributions, by threatening the owners with foreclosure:

> The limited partners primary, if not exclusive objective is to prevent or forestall an adverse tax event (i.e. HUD foreclosure on the property). Foreclosure will require the investors to go out of pocket to pay "exit" taxes. Foreclosure is treated like the sale of the property for a dollar over the unpaid principal mortgage balance. The investors who received tax benefits in the form of depreciation deductions must individually pay their pro-rata of tax on non-cash gain and recapture penalties, if any, under Section 1250 of the Internal Revenue Code. (emphasis and punctuation in original).

SWAT Training Manual, FCJA at 210.

The New Enforcement Policy, which Retsinas and Dunlap had created and announced, was dutifully implemented by HUD's field and area offices. For example, the HUD Rhode Island Office informed owners of multifamily housing that:

> [w]e have been instructed by the Deputy Assistant Secretary for Multifamily Housing that it is no longer appropriate to increase rents for repairs or rehabilitation that places the burden of paying for an owners' regulatory compliance on HUD.

Complaint, 17, SCHS Associates v. Cuomo, CA 97-368L, November 3, 1997.

The Director of Multifamily Housing for the Houston Area Office, Albert Cason, in his letter of February 23, 1996, described the New Enforcement Policy in the following manner:

> Our position, more accurately stated, is merely that the owner must maintain the project in "good repair and condition," as required by the Regulatory Agreement. This obligation is absolute. It is not conditioned on the availability of rental income, funds in the Replacement Reserve Accounts, government subsidies, or any other source of cash. . . . [W]e believe our position is soundly based on policy and is not capricious, arbitrary, or illegal.

Letter of February 23, 1996, from Albert Cason to Deane Earl Ross, at 2, FCJA at 97.

Christopher Village did not accede to HUD's extortionate demand and, as a result, the mortgage was foreclosed.

Proceedings Below

Christopher Village Sued HUD in United States District Court and Appealed to the Fifth Circuit

In order to save its property, Christopher Village sued HUD in United States District Court in Texas.

The United States District Court granted HUD's Motion for Summary Judgment.

Plaintiffs noticed an appeal to the Fifth Circuit. The case was briefed and argued. Christopher Village filed a Motion to Stay the foreclosure of Mockingbird Run. The motion was denied. HUD held a foreclosure sale and bid in Mockingbird Run.

In a letter of March 15, 1999, the Clerk of the Court for the Fifth Circuit informed the parties that the Court had

raised the issue of whether this case was moot because Appellants' sought only non-monetary relief.

Both HUD and Christopher Village briefed the mootness issue. Christopher Village relied on *Duke Power v. Environmental Study Group*, 438 U.S. 59, 70-71 (1978) and *Powell v. McCormack*, 395 U.S. 486 (1969). Christopher Village also told the Fifth Circuit that:

> [T]his case presents an additional basis for continued jurisdiction. Wilshire [an appellant] is the general partner of the other Appellant, the partnership that owned Mockingbird Run. In addition, Wilshire is also the general partner in other limited partnerships that will be directly affected by this case. Every one of these owners is subject to the same extortion by HUD, as seen in the case of Mockingbird Run.
>
> The only effective relief for Wilshire --aside from Mockingbird Run -- is that available in this case from this Court. HUD can foreclose faster than a property owner can litigate. One would hope that a declaratory judgment telling a department of government that certain conduct is illegal would have some deterrent effect.
>
> Even though a case may appear to be moot, it is justiciable and still presents a "case or controversy" if the issues raised are capable of repetition, yet evading review. See Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911). This occurs when: the challenged action is too short in duration to be fully litigated prior to its cessation or termination; and, there is a reasonable expectation that the same complaining party will be

> subject to the same action again. Wilshire will be subject again to HUD's extortionate demands.

Appellant's Letter Brief of March 20, 1999, to the Clerk of the Court.

While the case was pending HUD surreptitiously conveyed Mockingbird Run to the Bryan Housing Authority ("BHA") for demolition. HUD had given BHA an "upfront grant" to raze the property. BHA paid $10.00 nominal consideration.

"At oral argument, HUD represented to [the Fifth Circuit] that it owned the property and had spent several million dollars renovating it when, in fact, it had already transferred the property to the City of Bryan several months before." *Christopher Village, L.P. v. Retsinas*, 190 F. 3d at 314 n. 7.

The Court of Appeals reversed the District Court. It held:

> Nothing in the National Housing Act, HUD's regulations, the Regulatory Agreement, or the HAP contract requires [Plaintiff], as a low income property owner, to absorb or subsidize operating and maintenance deficiencies. Instead, the programs are designed to ensure that HUD establishes rental rates so that property owners receive enough revenue to cover all of the property's expenses including maintenance, repairs, debt service, taxes, and a six percent return on investment. See 12 U.S.C.A. § 1747c. Thus, the HUD reimbursement scheme resembles cost-plus contracts or public utility regulation, in either of which situations the private party who performs the work is assured of recovering reasonably incurred costs as well as a reasonable return on investments.

Christopher Village, L. P. v. Retsinas, 190 F.3d 310, 316 (5th Cir. 1999).

The Court of Appeals granted Plaintiffs' Motion for Summary Judgment. The Solicitor General declined to seek rehearing en banc from the Fifth Circuit or to seek a writ of certiorari from this Court.

Christopher Village Sued the United States in the Court of Federal Claims

On September 21, 1999, within six days of the Fifth Circuit decision, this case was filed as a class action in the United States Court of Federal Claims pursuant to 28 U.S.C. § 1491.

The trial court instructed the government lawyers that they would have to file an affidavit and what the affidavit must state if they wished to prevent class certification. FCJA at 284, 286-287. The government lawyers complied with the court's instructions. FCJA at 287.

The trial court denied Christopher Village's Motion for Class Certification, relying on the affidavit that the Court had instructed the government to prepare.

The parties filed cross-motions for summary judgment. The Government was allowed to supplement its motion with documents pertaining to a plea and settlement agreement between the Management Assistance Group, Incorporated ("MAGI") and the United States. MAGI owns a one-tenth of one percent (.001) indirect interest in Christopher Village. The Court treated the plea by MAGI as fraud by Christopher Village, the contractor with HUD under the Regulatory Agreement. The Court then held that such fraud was a "prior material breach" by Christopher Village and precluded application of *res judicata.*

Christopher Village had filed an affidavit in support of its argument that Christopher Village had committed no fraud. The government did not file an opposing affidavit. The trial court granted the government's motion for summary judgment.

Christopher Village Appealed to the Federal Circuit

The Federal Circuit incorrectly described the issue before it, as follows:

> This case presents the question whether a federal district court has jurisdiction to issue a declaratory judgment as to the government's liability for breach of contract solely in order to create a "predicate" for suit to recover damages in the Court of Federal Claims.

Christopher Village, L.P. v. United States, 360 F.3d at 1321.

Christopher Village and Wilshire Investments Corporation had sued HUD in district court to: save Mockingbird Run from HUD foreclosure; protect Christopher Village's limited partners from an enormous, immediate tax liability ($2.2 million) that, as a matter of law, would result automatically from foreclosure; and, prevent HUD's declaring a default and foreclosing on the approximately 40 other properties owned by other limited partnerships in which Wilshire Investments Corporation was the general partner.

When the lawsuit in district court was filed HUD had not foreclosed. Christopher Village and Wilshire Investments Corporation were attempting to preserve its contracts with HUD. They sought to have HUD's interpretation of those contracts pursuant to HUD's New Nationwide Enforcement policy declared illegal. Damages

for breach of contract would have been antithetical to the relief that they were seeking in district court.

The Federal Circuit held that the action in district court was simply an action for money damages for breach of contract, despite any indication to this effect in the pleadings or otherwise. Yet, later in the same opinion, the Federal Circuit held that:

> [A]s the Fifth Circuit correctly held, the claim that originally formed the basis for this jurisdiction under the APA, [were the] request to enjoin HUD's foreclosure and sale . . . .

Id. at 1327.

The Federal Circuit Affirmed the Court of Federal Claims

On appeal, affirming the Claims Court, the Federal Circuit held that Christopher Village, Limited Partnership v. Retsinas became moot when HUD foreclosed on and sold Mockingbird Run during the pendancy of the appeal to the Fifth Circuit: "the Fifth Circuit lacked jurisdiction over the action for declaratory judgment because the APA did not waive the United States' sovereign immunity for such a suit in district courts" and, thus, "the Fifth Circuit's judgment is void, [and] it is not entitled to preclusive effect, despite the fact that the court's jurisdiction was not challenged on direct review." Christopher Village, L.P. v. United States, 360 F.3d 1319, 1327, 1329, 1333 (Fed. Cir. 2004).

REASONS FOR GRANTING THE PETITION

Christopher Village, L.P. v. United States, supra, the subject of this petition, decided by the Federal Circuit, conflicts directly with *Christopher Village, Limited Partnership v. Retsinas,* decided by the Fifth Circuit..

As part of its continuing effort to enlarge its jurisdiction beyond the scope of the Tucker Act, see *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002), the Federal Circuit held that the Fifth Circuit and the United States district court had no jurisdiction to hear and decide a case seeking judicial review of agency action or to grant equitable relief. The Federal Circuit held that the Court of Federal Claims had exclusive jurisdiction over this case as a breach of contract case for money damages.

The Federal Circuit ruled that the Fifth Circuit and the United States District Court for the Southern District of Texas had no jurisdiction to review agency action or to enjoin HUD from taking the property of an owner, declared the Fifth Circuit decision void, and held that Christopher Village's only remedy would have been contract damages in an action for breach of contract in the Court of Federal Claims.

The Federal Circuit held:

> There is no question that the appellants here could have originally sued the United States in the Court of Federal Claims to recover for breach of contract. Indeed, that is the very premise of the Fifth Circuit's "predicate" decision. Under these circumstances we must conclude that the Fifth Circuit lacked jurisdiction over the action for declaratory judgment because the APA did not waive the United States' sovereign immunity for such a suit in district courts.

Christopher Village, L.P. v. United States, 360 F.3d at 1329.

Christopher Village could only have pursued a sole remedy for breach of contract if it had been willing to lose its property, expose its limited partners to a crushing tax burden, and allow its tenants to become homeless. The Federal Circuit held that Christopher Village could bring no action to save its property. Under

the Federal Circuit's holding, none of the owners of the more than 3 million HUD assisted apartment units in the United States will be able to obtain judicial review of illegal action by HUD. Under this holding, these owners are powerless to prevent HUD from illegally taking their property and are compelled to accede to HUD's extortionate demands.

1. Whether 5 U.S.C. § 704 waives the Government's sovereign immunity so to allow Federal courts to have jurisdiction under 28 U.S.C. § 1331 to review agency action is an issue vital to the administration of justice.

The Federal Circuit's decision is based on its construction of Section 704 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704. Section 704 of the APA has nothing to do with the jurisdiction of the Federal Circuit; however, section 704 provides the waiver of sovereign immunity essential to the district courts jurisdiction under 28 U.S.C. § 1331 to make decisions in APA cases, and the jurisdiction of the United States Courts of Appeal to review those decisions.

The Federal Circuit's decision is based in part on its view that the decision of the Fifth Circuit "substantially infringe[s] the authority of another tribunal or agency of government," the Court of Federal Claims. *Christopher Village, L.P. v. United States*, 360 F.3d at 1330. The Federal Circuit held that an action for breach of contract in the Court of Federal Claims was "an adequate remedy" under Section 704. Under this view, Section 704 did not provide a waiver of sovereign immunity necessary for the district court and the Fifth Circuit's jurisdiction.

Anyone aggrieved by agency action and desiring judicial review of that action is adversely affected by the Federal Circuit's decision. If the person aggrieved entered

into any agreement with that agency, the Federal Circuit's decision relegates the person aggrieved to whatever breach damages he can obtain from the Court of Federal Claims.

The Federal Circuit's decision totally forecloses the possibility of anyone seeking equitable relief to prevent the Government from breaching a contract, even when such breach will cause irreparable harm for which, by definition, money damages are inadequate.

Aside from amending section 704 of the APA. the Federal Circuit rewrote the jurisprudence pertaining to declaratory judgments and, in the process, overruled *Duke Power v. Environmental Study Group*, 438 U.S. 59, 70-71 (1978) and *Powell v. McCormack*, 395 U.S. 486, 517-18 (1969).

The Federal Circuit has taken it upon itself to review the determination by Fifth Circuit in *Christopher Village v. Retsinas, supra*, that it had subject matter jurisdiction to render a declaratory judgment.

Yet, the Federal Circuit's decision to protect the exclusive jurisdiction of the Court of Federal Claims infringes the authority of the Fifth Circuit, other courts of appeal, and United States district courts and confers upon itself a role exclusively that of this Court: to review decisions of the courts of appeal.

The Federal Circuit's decision not only declares *Christopher Village v. Retsinas* void, but also undermines the Fifth Circuit's unanimous en banc decision in *United States v. Southland Mgmt. Corp.*, 326 F.3d 629 (5th Cir. 2003).

In her concurring opinion in that case, Judge Edith Jones, who had authored Christopher Village, makes clear the import of Christopher Village.

> [I]t is undisputed that all of the money received by the owners in rent payments and HUD subsidies was applied to the mortgage and/or the upkeep of

> the project from 1993 onward. Since HUD policies governed both the amount of rent charged to the tenants and the amount of monthly subsidies, HUD determined the ultimate quality of the project. In this case - where there is no evidence of the owners' misapplication of funds or mismanagement - if the project was not decent, safe and sanitary, HUD's control of the pursestrings led to that result. The owners were not required to invest their capital in the project. Christopher Vill. Ltd. P'ship, 190 F.3d at 316.

United States v. Southland Mgmt. Corp, 326 F.3d at 681, Jones, J. with whom Smith, Barksdale, DeMoss, and Clement JJ. join specially concurring, FCJA at 180.

Three judges of the Federal Circuit reviewing the decision of an Article I Court cannot be allowed to vitiate the decisions of a United States Court of Appeals based on their perception of what "an adequate remedy" might be. Three judges could not even overrule the decision of another panel of their own court.

2. The Federal Circuit's decision unlawfully relegates victims of an agency's unlawful interpretation of an agreement, contract, memorandum of understanding, or the like, to an action for breach of contract in an Article I court that cannot grant declaratory or any other form of equitable relief.

This Court and the lower federal courts of general jurisdiction have repeatedly and emphatically rejected the notion advanced by the Federal Circuit in this case.

The Fifth Circuit reviewed HUD's policy in light not only of HUD's contracts, but also HUD's organic statutes, and regulations and found no justification for the policy.

As this Court held in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), "we are not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief fashioned in the light of the rather complex ongoing relationship between the parties." *Id.* at 904.

The "complex ongoing relationship between the parties" in *Bowen* is manifest here. Indeed, the untiring efforts of the government to nullify the Fifth Circuit decision in *Christopher Village* demonstrate clearly the significance of that decision to the ongoing relationship between HUD and the owners of low-income multifamily housing.

Again, as this Court held in *Bowen v. Massachusetts*, a district court had jurisdiction to review the challenged agency action and the United States Court of Federal Claims had no jurisdiction because: "insofar as the complaints sought declaratory and injunctive relief, they were certainly not actions for money damages." *Bowen v. Massachusetts*, 487 U.S. at 893.

Contrary to the holding of the Federal Circuit, Christopher Village's action in district court was not "fram[ed] ... as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States." Christopher Village, L.P. v. United States, 360 F.3d at 1328. Christopher Village sought declaratory and injunctive relief in district court to: retain its real property; prevent the I.R.S. from levying a $2.2 million tax on its limited partners; and, preserve Mockingbird Run as multifamily low-income housing for its tenants. None of these objectives could be obtained in the Court of Federal Claims.

The complaint that Christopher Village filed in the Southern District of Texas stated clearly that:

> Plaintiffs are not seeking direct monetary relief against the Government but rather the declaration of the unlawfulness of HUD's actions and inactions in refusing to consider Plaintiff's request for a rent increase in accordance with HUD's statutory, regulatory and administrative requirements and a mandamus for the legally required ministerial acts. They further request that HUD's unlawful extortion be enjoined.

Complaint, ¶ 49.

Christopher Village also sought "a permanent injunction precluding HUD from initiating or continuing any foreclosure action." Complaint, ¶74.

The contract interpretation and policy found illegal by the Fifth Circuit has been, and continues to be, applied by HUD. As HUD announced in 1997, this policy directly affects over 15,000 insured or HUD held multifamily mortgages totaling $47 billion.

Here, as in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 124 (1974), "[t]his policy is fixed and definite. It is not contingent upon executive discretion." As this Court continued,

> In the case now before us, the state action is not at all contingent. Under the petitioners' view of the case, it is immediately and directly injurious to the corporate petitioners' economic positions. Where such state action or its imminence adversely affects the status of private parties, the courts should be available to render appropriate relief and judgments affecting the parties' rights and interests.

Id. at 125

The issues raised before and decided by the Fifth Circuit are capable of repetition, yet evading review. See *Southern*

Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911).

As Christopher Village pointed out to the Fifth Circuit, HUD can foreclose faster than a property owner can litigate. HUD gives the owner of the property 30 days to infuse the cash to pay for the capital items and deferred maintenance. If the owner does not pay within 30 days HUD declares a default and forecloses.

A collateral consequence of foreclosure is an immediate, enormous tax bill that must be paid for the year in which the foreclosure occurred. The previous accelerated depreciation must be repaid and the nonrecourse portion of the debt is treated as a capital gains. HUD has instructed its staff to use this staggering potential tax bill as a means of forcing reluctant owners and their limited partners to infuse the cash that HUD demands. SWAT Training: Special Workout Assistance Teams" (March 1996) ("SWAT Training Manual"), FCJA at 184-211.

Another collateral consequence of foreclosure is debarment of the owner, the owner's general partner, and the property manager. Thus, not only is there an immediate tax consequence, but also, all entities deemed culpable by HUD are put out of business. This is exactly what HUD attempted in *Nail v. Martinez*, Civil Action 3:02-CV-299BN, S.D.Miss, December 2, 2002,

However much in vain in the case of HUD, one would hope that a declaratory judgment telling a department of government that certain conduct is illegal would have some deterrent effect.

The issues decided by the Fifth Circuit were not only capable of being repeated, but were repeated from 1994 until now. For example, in *Nail v. Martinez*, Civil Action 3:02-CV-299BN, S.D.Miss, December 2, 2002,

HUD had debarred a conscientious property owner who would not accede to its demands that the Fifth Circuit had held were illegal. Based on Christopher Village, the owner was granted summary judgment.

Here, many, if not most, of the limited partners who had invested in Christopher Village in 1983 are now retired. When HUD foreclosed the limited partners incurred an immediate tax liability of $2.2 million. Under the Federal Circuit's decision the limited partners would only be able to bring an action for breach of contract in the Court of Federal Claims and hope that after four and one-half years they might obtain some relief.

3. The Federal Circuit Has Restored the Pre-Christopher Village Confusion and Allows HUD to Continue Its Illegal Policy

This case does not involve a situation where a court merely declines to review action challenged as illegal. Rather, here, the Federal Circuit not only nullified an existing decision that had put the issue to rest, but also affirmatively reintroduced the confusion that public policy disdains.

As this Court held in *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953):

> Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. United States v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897); Walling v. Helmerich & Payne, Inc., 323 U.S. 37 (1944); Hecht Co. v. Bowles, 321 U.S. 321 (1944). A controversy may remain to be settled in such circumstances, United States v. Aluminum Co. of America, 148 F.2d 416,

> 448 (1945), e. g., a dispute over the legality of the challenged practices. Walling v. Helmerich & Payne, Inc., supra; Carpenters Union v. Labor Board, 341 U.S. 707, 715 (1951). The defendant is free to return to his old ways. n4 This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. United States v. Trans-Missouri Freight Assn., supra, at 309, 310. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right, Labor Board v. General Motors Corp., 179 F.2d 221 (1950). The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

The Fifth Circuit's rejection of HUD's policy of extortion was based on comprehensive analysis of HUD's organic statutes, regulatory scheme, HAP contracts and regulatory agreements. Thus, *Christopher Village, L.P. v. Retsinas, supra,* has been the mainstay of litigants who have been illegally debarred by HUD because they would not accede to HUD's demands to invest their capital in the project.

For example, in *Nail v. Martinez*, C.A. No. 3:02cv299BN, December 2, 2002, Stephen Nail ("Nail") and Intervest Corporation ("Intervest") appealed HUD's decision to debar them. Nail and Intervest argued that HUD's decision to debar them was arbitrary and capricious and otherwise in violation of applicable law because that decision violated the law as interpreted by the Fifth Circuit in Christopher Village v. Retsinas, supra. The District Court granted Nail and Intervest's Motion for Summary Judgment and held that HUD's decision was arbitrary and capricious.

In *Nail v. Martinez*, the District Court held, *inter alia,* that:

> In arriving at its holding, the Fifth Circuit conducted a detailed analysis of the statutes and regulations that make up the regulatory scheme in question. . . . Significantly, the Fifth Circuit noted that "[n]othing in the National Housing Act, HUD's regulations, the Regulatory Agreement, or the HAP contract requires Village, as a low income property owner, to absorb or subsidize operating and maintenance deficiencies." Instead, "the HUD reimbursement scheme resembles cost-plus contracts or public utility regulation, in either of which situations the private party who performs the work is assured of recovering reasonably incurred costs as well as a reasonable return on investments." (internal citations omitted)
>
> The interplay of HUD regulations, the requirements that property owners maintain the property with no source of income other than rental revenues, and the use of a non-recourse note loan to purchase the properties, "makes clear that all of the expenses of operating and maintaining a low-income housing project must be paid out of the rental revenues, which in turn are subsidized by HUD. The regulatory scheme does not contemplate that property owners must bear the risk of maintaining the properties based on insufficient rental revenues." (internal citations omitted)

Nail v. Martinez, Slip Op. at 12-14.

If the decision of the Federal Circuit is allowed to stand, owners of low-income property will be at the mercy of HUD. Moreover, any property owner who has

successfully challenged a HUD debarment could only later file an action for breach of contract in the Court of Federal Claims at its peril. It would risk having the Claims Court and the Federal Circuit invalidating its erstwhile victory in district court.

4. The Federal Circuit Decision Rewards and Encourages Litigants to Engage in Deceitful Conduct Designed to Manipulate the Judicial Process and Insulate a Favorable Decision from Review.

In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), this Court held:

> Moreover, our appraisal of Pap's affidavit is influenced by Pap's failure, despite its obligation to the Court, to mention a word about the potential mootness issue in its brief in opposition to the petition for writ of certiorari, which was filed in April 1999, even though, as Justice Scalia points out, Kandyland was closed and that property sold in 1998. See Board of License Comm'rs of Tiverton v. Pastore, 469 U.S. 238, 240, 83 L. Ed. 2d 618, 105 S. Ct. 685 (1985) (per curiam). Pap's only raised the issue after this Court granted certiorari.
>
> In any event, this is not a run of the mill voluntary cessation case. Here it is the plaintiff who, having prevailed below, now seeks to have the case declared moot. . . . . Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here.

City of Erie v. Pap's A.M., 529 U.S. at 288.

The government's efforts to insulate the district court decision in the southern district of Texas make Pap's misdeeds pale into insignificance. In particular:

(1). Christopher Village sought an emergency stay from the Fifth Circuit to forestall the foreclosure sale of Mockingbird Run. The government submitted in opposition an affidavit from a HUD official swearing that: 18,000 people have requested copies of the prospectus and that "bidders from around the country will incur significant costs to attend the sale."

The notice of default and foreclosure sale signed by the Commissioner, was clear: "HUD will not provide Section 8 funds with the sale of this property." HUD, Christopher Village, and the Commissioner[1] all knew that only HUD would attend the sale and that only HUD would bid. This has occurred many times before at ,many sales across the country. As Christopher Village had informed the Court only HUD attended and HUD bid in the property, creating an enormous deficiency which was then taxed by IRS as a capital gains.

(2) "At oral argument, HUD represented to [the Fifth Circuit] that it owned the property and had spent several million dollars renovating it when, in fact, it had already transferred the property to the City of Bryan several months before." *Christopher Village,L.P. v. Retsinas,* 190 F. 3d at 314 n. 7.

(3) After counsel for Christopher Village had notified the Fifth Circuit of HUD's deliberate misrepresentation, the government assured the Court that the property was to be used for housing for the elderly.

---

[1] The Commissioner told counsel for Christopher Village that anyone foolish enough to bid on the property under the conditions of sale would probably lack the capacity to enter into a binding contract.

The City of Bryan, Texas informed counsel for Christopher Village that HUD had given it a $1.8 million grant to raze the property. When the government discovered that its deceit had once again been uncovered it then notified the Fifth Circuit that it had just learned that the property was going to be demolished.

The Fifth Circuit was not swayed by the government's efforts to render the case moot and granted Christopher Village the declaratory judgment it had sought.

The government was able to convince the Federal Circuit to do what the Fifth Circuit had refused to do: Insulate the government's ephemeral victory in district court and legalize HUD's extortion of all owners of Section 8 property.

As Chief Justice Burger noted in *Fusari v. Steinberg*, 419 U.S. 379, 390, Burger, C.J. concurring (1975):

> It is disconcerting to this Court to learn of relevant and important developments in a case after the entire Court has come to the Bench to hear arguments. Even at oral argument we were not informed of the changes in state law although both parties filed their briefs after the new statute was passed.

Here, the Federal Circuit is not merely encouraging and rewarding a failure to inform, but rather, a deliberate misrepresentation.

5. The Decision of the Court of Federal Claims that the Federal Circuit Affirmed Was Not Only Rejected as Arbitrary and Capricious by the United States District Court for the Southern District of Mississippi, but also, Found to Be Not Substantially Justified.

In *Nail v. Martinez, supra*, the Court of Federal Claims decision affirmed by the Federal Circuit in this case was the centerpiece of HUD's argument. HUD

argued that the Fifth Circuit decision involved merely rent increase requests and was inapposite to the case at bar. Judge Barbour rejected HUD's argument as arbitrary and capricious and, subsequently, held that HUD was not even substantially justified in making its argument. He held that the distinction argued by HUD with regard to the owner's rent increase requests was unsound and not material. *Nail v. Martinez, supra*, slip op. at 15.

Moreover, the Solicitor General of the United States declined to allow an appeal of the District Court decision in *Nail v. Martinez, supra.*

6. The Government Has Unlawfully Used Its Sovereign Powers to Avoid the Consequences of Its Having Entered into the Market Place and Shift to Private Parties the Cost of Meeting its Public Responsibilities.

Once the government "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same rules that govern individuals there." *Cooke v. United States,* 91 U.S. 389, 398, (1875). Moreover, the government may not "shift the costs of meeting its legitimate public responsibilities to private parties." *United States v. Winstar Corp.,* 518 U.S. 839, 896 (1996).

These two well-known proscriptions against the use of governmental power were violated by HUD in the enforcement of the national policy found illegal by the Fifth Circuit in *Christopher Village v. Retsinas, supra.* The Federal Circuit's decision will allow HUD once again to employ illegally its governmental powers.

7. The Federal Circuit Decision, Unless Reversed, Will Be a Beacon Warning Future Potential Investors Away from Government Programs that Rely on Private Capital.

The case in the Court of Federal Claims was brought as a class action. Over 1,500 property owners were subjected to the interpretation of the regulatory agreement found illegal by the Fifth Circuit. Ironically, while holding itself out as the ultimate arbiter of what agency action is legal, the Federal Circuit vividly demonstrates one reason of many why it has neither the competence or the jurisdiction to decide such cases.

According to the Federal Circuit, a plaintiff cannot attempt to save its property by filing an action for equitable and declaratory relief in a district court close to home. Rather, a plaintiff must allow the illegal action to take place, forego prospective relief, suffer irreparable, collateral consequences, bring an action in an Article I court, and pay legal fees for a seemingly interminable period while the case is pending. Not only this Court, but also, United States courts of appeal have held otherwise.

For example, in *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 610 (D.C. Cir. 1992), the Court held:

> Crucially, [Sharp v. Weinberger, 798 F.2d 1521 (D.C.Cir. 1986)], tells us that litigants may bring statutory and constitutional claims in federal district court even when the claims depend on the existence and terms of a contract with the government.

Construing *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the *Transohio* Court held that:

> It is no response to suggest that Transohio could reframe its claim as one for damages and bring it in the Claims Court. That is precisely the "restrictive--and unprecedented--interpretation of § 704" that the Supreme Court rejected in its most recent case addressing the relationship between the APA and the Tucker Act, Bowen v. Massachusetts, 487 U.S.

879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988). Like the Court in Bowen, "[w]e are not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief fashioned in the light of the rather complex ongoing relationship between the parties." Id. at 904, 108 S.Ct. at 2737. *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d at 608.

CONCLUSION

For the reasons set forth above, the Petition should be granted.

Respectfully submitted,

E. Grey Lewis
Counsel of Record for Petitioners
1825 I Street, N.W.,
Suite 400
Washington, D.C. 20006
(202) 429-2082

United States Court of Appeals,
Federal Circuit.

CHRISTOPHER VILLAGE, L.P. and Wilshire Investments Corp., Plaintiffs-Appellants,
v.
UNITED STATES, Defendant-Appellee.

No. 02-5188.

March 8, 2004.

Background: Limited partnership and its general partner, as former owners of federally subsidized low-income housing project, brought suit against the United States alleging that foreclosure by United States Department of Housing and Urban Development (HUD) constituted breach of partners' contracts with HUD. The United States Court of Federal Claims, Nancy B. Firestone, J., granted summary judgment for United States, 53 Fed.Cl. 182. Partners appealed.

Holdings: The Court of Appeals, Dyk, Circuit Judge, held that:

(1) district court in related action did not have jurisdiction to issue declaratory judgment as to government's liability for breach of contract solely in order to create "predicate" for suit to recover damages in Court of Federal Claims;

(2) ruling of Fifth Circuit Court of Appeals in related case was void;

(3) contract between government and former owners was not enforceable against government; and

(4) global settlement with general partner did not preclude government from using alleged fraudulent conduct by general partner as defense to breach of contract claim.

Affirmed.

West Headnotes

[1] Federal Courts 1139
170Bk1139 Most Cited Cases

[1] United States 125(16)
393k125(16) Most Cited Cases

Federal district court in related action did not have jurisdiction to issue declaratory judgment as to government's liability for breach of contract solely in order to create "predicate" for suit to recover damages in Court of Federal Claims, since Court of Federal Claims had exclusive jurisdiction under Tucker Act to adjudicate breach of contract claims for money damages in excess of $10,000, and Congress had not waived sovereign immunity for such suits in district courts. 28 U.S.C.A. § 1491.

[2] Federal Courts 541
170Bk541 Most Cited Cases

Jurisdiction for the Court of Appeals is dependent on a district court's jurisdiction. 28 U.S.C.A. § 1291.

[3] United States 125(5)
393k125(5) Most Cited Cases

Administrative Procedure Act (APA) has broadened the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by its provisions, but the waiver of sovereign immunity under the APA is limited. 5 U.S.C.A. § 551 et seq.

[4] United States 125(5)
393k125(5) Most Cited Cases

Administrative Procedure Act (APA) limits the government's waiver of sovereign immunity to situations where no other adequate remedy exists. 5 U.S.C.A. § § 702, 704.

[5] Judgment 489
228k489 Most Cited Cases

[5] Judgment 577(2)
228k577(2) Most Cited Cases

[5] Judgment 660.5
228k660.5 Most Cited Cases

The fact that a court did not have jurisdiction over a suit in which it issued a decision does not automatically strip that decision of preclusive effect; in most circumstances, a judgment may not be collaterally attacked on the ground that the original tribunal lacked subject matter jurisdiction, even if the issue of subject matter jurisdiction has not been litigated in the first action.

[6] Judgment 577(2)
228k577(2) Most Cited Cases

Res judicata doctrine did not apply to decision of

Fifth Circuit Court of Appeals in related case, that directed district court to grant declaratory judgment in favor breach of contract claims of former owners of federally subsidized low-income housing complex, since ruling of Circuit Court was void; although district court had jurisdiction over original action which had been brought to enjoin foreclosure by government, Circuit Court lacked jurisdiction over action after Department of Housing and Urban Development (HUD) foreclosed upon and sold complex, and Administrative Procedure Act (APA) did not waive sovereign immunity of United States with respect to breach of contract claim in district court. 5 U.S.C.A. § § 702, 704.

[7] United States ⚿82(3.3)
393k82(3.3) Most Cited Cases

Contract between government and former owners of federally subsidized low- income housing project was not enforceable against government, since government's alleged breach was predated by material breach by former owners, who submitted false data generated by company under their common control in successful effort to defraud government, even though government was not aware of those facts at time of its alleged breach.

[8] Contracts ⚿303(1)
95k303(1) Most Cited Cases

When a party to a contract is sued for its breach, it may ordinarily defend on the ground that there existed a legal excuse for non-performance at the time of the breach.

[9] Federal Civil Procedure ⚿2397.5

170Ak2397.5 Most Cited Cases

Administrative agreement and consent judgment between government and managing general partner, which barred future governmental claims against managing general partner for alleged fraud, did not preclude government from using alleged fraudulent conduct by general partner as defense in subsequent breach of contraction action by limited partner and general partner, as former owners of federally subsidized low income housing project; existence of false data was undisputed, and it was generated by company under partners' common control in successful effort to defraud government.

[10] United States 73(22)
393k73(22) Most Cited Cases

The submission of false data to the government, generated by companies under common control, constitutes a material breach of a governmental contract by any of the commonly controlled companies, at least when the commonly controlled company generated that data in a conscious effort to defraud the government.
***1321** E. Grey Lewis, of Washington, DC, argued for plaintiffs- appellants. Of counsel on the brief was E.C. Baynard, Baynard & Cartner, of Washington, DC.

Steven J. Gillingham, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. Of counsel were David M. Cohen, Director; and Nancy Christopher, Attorney, Office of General Counsel, Department of Housing and Urban

Development, of Washington, DC.

Before LOURIE, GAJARSA, and DYK, Circuit Judges.

DYK, Circuit Judge.

This case presents the question whether a federal district court has jurisdiction to issue a declaratory judgment as to the government's liability for breach of contract solely in order to create a "predicate" for suit to recover damages in the Court of Federal Claims. We hold that district courts do not have such jurisdiction because the Court of Federal Claims has exclusive jurisdiction under the Tucker Act, 28 U.S.C. § 1491 (2000), to adjudicate breach of contract claims for money damages in excess of $10,000, and Congress has not waived sovereign immunity for such suits in district courts.

Here, the United States District Court for the Southern District of Texas, and on appeal the United States Court of Appeals for the Fifth Circuit, lacked jurisdiction to issue such a "predicate" judgment, and the "predicate" judgment was void. It follows that the Court of Federal Claims was not bound by this earlier judgment.

On the merits, we affirm the Court of Federal Claims' grant of summary judgment. We agree that the contract between the government and the appellants was unenforceable against the government because of a material breach by the appellants predating the government's alleged

breach.

BACKGROUND
I

The National Housing Act was designed to "assist private industry in providing housing for low and moderate income families and displaced families." 12 U.S.C. § 1715l(a) (2000). It authorized the Department of Housing and Urban Development ("HUD") to insure mortgages used to construct certain low-income housing. *Id.* § 1715l(b). Owners of such properties were also entitled to certain tax benefits. *See Chancellor Manor v. United States,* 331 F.3d 891, 894 (Fed.Cir.2003). In return for this mortgage insurance and tax benefits along with various other benefits, landlords agreed to be "regulated or supervised ... by the Secretary under a ***1322** regulatory agreement." 12 U.S.C.A. § 1715l(d)(3) (West Supp.2003).

The appellants, Christopher Village, L.P. and its managing general partner, Wilshire Investments Corp., owned a federally subsidized low-income housing complex known as Mockingbird Run Apartments ("Mockingbird Run"). Mockingbird Run was built in 1970 with an insured mortgage obtained under the National Housing Act, *id.* § § 1701-1750g (2000). In accordance with National Housing Act requirements, the appellants entered into a standard regulatory agreement with HUD concerning Mockingbird Run (the "Regulatory Agreement"). The Regulatory Agreement required the appellants to "maintain the mortgaged premises ... in good repair and condition." Regulatory Agreement ¶ 7 (App. at 2002). *See also* 24 C.F.R. § 221.530(b) (1995). The agreement authorized

HUD to regulate rents. Regulatory Agreement ¶ 4(f) (App. at 2001) ("The rent charged for each unit shall not exceed the upper limit of the range shown for such type of unit on the rental schedule approved in writing by the Commissioner [of HUD] ...."); *see also* 12 U.S.C. § 1747c (2000) ("[T]he investor shall not charge or collect rents for any dwellings in the project in excess of the appropriate rents therefor as shown in the latest rent schedule approved pursuant to this section."). According to HUD regulations, HUD-approved rent schedules were meant to "compensate for any increase in ... operating and maintenance costs over which owners have no effective control...." 24 C.F.R. § 886.112(b) (1995). The Regulatory Agreement also stated that the landlord could not increase "the amount of the gross monthly dwelling income for all units ... unless such increase is approved by the Commissioner." Regulatory Agreement ¶ 2(g) (App. at 2001); *see also* 24 C.F.R. § 886.112(b) (1995).

The appellants also entered into a Housing Assistance Payment contract (the "HAP Contract") with HUD pursuant to the United States Housing Act, 42 U.S.C. § 1437f (2000). (App. at 2100.) That Act authorized HUD to enter into contracts with landlords to subsidize rental payments of tenants living in private, low-income housing. *See Cisneros v. Alpine Ridge Group,* 508 U.S. 10, 12, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993). Under the HAP Contract, the appellants received "assistance payments" in "an amount calculated to make up the difference between the tenant's contribution and the contract rent agreed upon by the landlord and HUD." *See id.* (internal quotations omitted). Like the Regulatory Agreement, the HAP Contract

regulated the appellants' management of Mockingbird Run, prohibiting the appellants from "charg[ing] any family an amount in excess of the" set allowable rents and requiring the appellants to "maintain and operate the contract units and related facilities so as to provide decent, safe and sanitary housing as defined by HUD." (App. at 2102.)

II

By 1995, the physical condition of Mockingbird Run had substantially deteriorated, necessitating approximately $2 million worth of repairs. Finding that the appellants had allowed the complex to deteriorate in violation of the Regulatory Agreement and the HAP Contract, HUD informed the appellants in April of 1995 that their failure to refurbish the property could lead to a default of the Regulatory Agreement and loss of the HAP Contract rent subsidies.

Thereafter, on June 23, 1995, the appellants requested a twenty-nine percent rent increase from HUD, claiming that the current rent revenue was inadequate to cover operating costs as well as maintenance and ***1323** repairs. HUD sent the appellants a letter on August 25, 1995, explaining that the Regulatory Agreement and HAP Contract imposed an absolute obligation on the appellants to maintain the property. The letter did not decide the appellants' rent increase request, but it instead demanded that the appellants deposit approximately $2 million in escrow to fund Mockingbird Run's needed repairs. The appellants did not deposit the $2 million. On September 6, 1995, HUD sent the appellants a second letter explaining that it would not entertain the appellants' request for a rent

increase unless they deposited the $2 million in escrow as the August letter demanded. The appellants again refused to pay the $2 million, and on September 14, 1995, HUD informed the appellants that they "had violated ... the Regulatory Agreement by not maintaining the mortgaged premises in good repair and condition [and that] HUD would proceed without further notice to take whatever remedies are appropriate." *Christopher Vill., L.P. v. Retsinas,* 190 F.3d 310, 313 (5th Cir.1999) (internal quotations omitted). On November 17, 1995, the Federal National Mortgage Association, the original lender, assigned the note and mortgage to HUD, and "HUD assumed control of the property as a mortgagee in possession" on December 1, 1995. *Id.* (explaining that once the Federal National Mortgage Association assigned the note to HUD, HUD "had the same remedial rights as the original lender"); *see* 24 C.F.R. § 207.255(a)(2) (2003); *see also United States v. Antioch Found.,* 822 F.2d 693, 695 (7th Cir.1987) (stating "in determining when to foreclose following a default, HUD has very broad discretion in order to achieve national housing objectives").

III

In October of 1995 the appellants brought suit in the United States District Court for the Southern District of Texas against HUD, the Secretary of HUD, and the Director of Multifamily Housing Management of the Houston Area Office of HUD, seeking mandamus, injunctive and declaratory relief pursuant to the Administrative Procedure Act, 5 U.S.C. § § 702, 706 (2000) ("APA"). *Christopher Vill., L.P. v. Cuomo,* No. Civ. H-95-5005, 1998 WL 422854 (S.D.Tex. Mar. 2, 1998). Arguing that

HUD illegally demanded $2 million in escrow and illegally refused to consider its request for a rent increase, the appellants sought mandamus and injunctive relief to prevent HUD from foreclosing on the Mockingbird Run property. The appellants also sought a declaratory judgment that their obligation to maintain the property was contingent upon receiving adequate rent revenue and that they were under no duty to make repairs unless they received adequate rent increases. In March of 1998 the district court granted summary judgment in favor of HUD on all counts, holding that HUD's decisions whether to grant rent increases were unreviewable and that the appellants had an absolute responsibility to properly maintain the property irrespective of rent increases. *Id.* at *34.

The appellants appealed to the United States Court of Appeals for the Fifth Circuit. While the case was pending in the Fifth Circuit, HUD sold the property in a foreclosure sale, and it was razed. *Christopher Vill.*, 190 F.3d at 312. The Fifth Circuit held that HUD's "foreclosure sale and transfer ... effectively mooted [the appellants'] request for an injunction and mandamus because of [the] court's inability to fashion adequate relief" since the "request for relief ... involve[d] a transfer of the property [that] amount [ed] to an impossible request for [the] court" to fulfill. *Id.* at 314-15 (internal quotations omitted). Nonetheless, the Fifth Circuit ***1324** held that the request for a declaratory judgment still "present[ed] a live dispute" because the appellants "could use the declaration as a predicate for a damages action against HUD in the Court of Federal Claims." *Id.* at 315.

On the merits, the Fifth Circuit agreed with the

district court that HUD decisions regarding requests for rent increases were indeed unreviewable under the APA because "Congress committed to HUD full discretion in determining whether to grant or deny a rent increase request." *Id.* However, the Fifth Circuit found that both the Regulatory Agreement and HUD's own regulations required "HUD at least to entertain a rent increase request." *Id.* at 316 (citing Regulatory Agreement ¶ 4(g), stating that HUD "will at any time entertain a written request for [a rent] increase" and 24 C.F.R. § 886.312(b), stating that in response to a request for a rent increase, HUD "shall approve a rental schedule ... or shall deny the increase stating the reasons therefor"). The court held that HUD "violated its contractual and regulatory duty to consider the rent request ... [thereby] render[ing] suspect HUD's other actions." *Id.* The Fifth Circuit further stated that the appellants' duty to properly maintain Mockingbird Run "was not absolute" and that the appellants' "cost of operating and maintaining the property, in addition to the cost of complying with the Regulatory Agreement, must be paid for out of the regulated rental revenues." *Id.* at 316-17. Although the Fifth Circuit found that "HUD could understandably refuse to provide financial assistance to an owner that has misappropriated funds, mismanaged the property, taken a profit instead of maintaining the property, or been negligent in its management in some other regard," the court held that there was no evidence establishing that any of these things had occurred. *Id.* at 317-18.

The Fifth Circuit accordingly reversed the district court's grant of summary judgment. It found that "HUD acted arbitrarily and capriciously when it

refused to abide by its legal obligation to consider a rental increase request from a non-negligent owner and instead demanded a $2 million cash infusion and then declared the property in default for those very reasons." *Id.* at 319. The court ordered that "[u]pon remand, the district court should issue [the appellants'] requested declaratory judgment." *Id.* HUD did not seek further review of the Fifth Circuit's decision. Neither, apparently, did the appellants seek a declaratory judgment from the district court as provided by the Fifth Circuit.

IV

On September 21, 1999, the appellants filed an action in the Court of Federal Claims for breach of contract, seeking certification of a class of similarly situated entities. Appellants contended that they were entitled to a finding of liability against HUD as a matter of law because the Fifth Circuit's ruling barred the government from relitigating the issue of breach of contract under the doctrine of res judicata.

Initially, the Court of Federal Claims denied the appellants' motion for class certification on October 26, 2001, finding that the appellants did not satisfy the *Quinault* requirements for certification, *see Quinault Allottee Ass'n v. United States,* 197 Ct.Cl. 134, 453 F.2d 1272 (1972). [FN1] *Christopher* ***1325** *Vill., L.P. v. United States,* 50 Fed.Cl. 635 (2001). In particular, the Court of Federal Claims found that common questions of law did not predominate over individual factual questions of class members; that the appellants' claim was not sufficiently typical of the class; and that the claims of individual class members were not necessarily too small to be pursued individually. *Christopher*

Vill., 50 Fed.Cl. at 642-44.

> FN1. These factors include: (1) whether the class is large but manageable; (2) whether there is a question of law common to the whole class; (3) whether the common question of law predominates over individual questions of fact; (4) whether the plaintiff's claim is typical of those claimed by the class; (5) whether the government's action is generally applicable to the class; (6) whether the claims of the class members are too small to be pursued individually; (7) whether the plaintiff will adequately represent the class; and (8) whether individual actions would create the risk of varying adjudications. *Christopher Vill.*, 50 Fed.Cl. at 643 (citing *Quinault*, 453 F.2d at 1272).

In 2001, while the damages action was pending in the Court of Federal Claims, criminal litigation regarding a fraudulent insurance scheme related to HUD projects was settled in the United States District Court for the Northern District of California. This litigation involved the Management Assistance Group, Inc. ("MAGI"), a company that shared a president and sole shareholder with Wilshire and was a limited partner of Christopher Village. The settlement of this criminal litigation on March 30, 2001, was effectuated through a plea agreement ("the Plea Agreement"). In the Plea Agreement MAGI pled guilty to engaging in an illegal insurance kickback scheme, which involved Mockingbird Run as well

as other HUD projects. Although neither Wilshire nor Christopher Village was a party to this Plea Agreement, Wilshire was a party to both the Consent Agreement and the Administrative Agreement, which, while not admitting any wrongdoing by Wilshire, barred future government claims against Wilshire.

HUD required MAGI to procure insurance for its affiliated properties, including Mockingbird Run. MAGI admitted that it required illegal kickbacks from the insurance company that covered its affiliated properties in order to retain its insurance business. The insurance company in turn inflated the true costs of insurance for these HUD-project properties, and it invoiced MAGI's affiliated properties, including Mockingbird Run, for the kickback costs as well as the actual insurance costs. These inflated insurance charges were then included as an expense item in documentation that the appellants subsequently submitted to HUD in 1992, 1994, and 1995 in order to justify rent increase requests for Mockingbird Run. *See generally* HUD Housing Handbook: Multifamily Asset Management and Project Servicing, Chapter 7: Processing Budgeted Rent Increases and Fees for Commercial Space & Services in Insured, Direct Loan and Non-Regulated HUD Project (Doc. No. 4350.1), *available at* http:// www.hudclips.org. The appellants also submitted a "Certification as to Purchasing Practices and Reasonableness of Expenses" with each of these requests, in which the appellants certified that "[a]mounts paid to individuals or companies having an identity-of-interest with the owner or the management agent were not excess of the costs that would have been incurred in making arms-length purchases on the

open market." (App. at 2577.) HUD granted the appellants rent increases in 1992 and 1994 for Mockingbird Run.

Subsequent to these events, the parties filed cross motions for summary judgment, and the Court of Federal Claims entered summary judgment in favor of the government. *Christopher Vill., L.P. v. United States,* 53 Fed.Cl. 182 (2002). The government claimed that the MAGI plea evidenced a prior material breach by the appellants, thereby excusing the government of liability for any later breach that ***1326** HUD may have committed by refusing to consider the rent requests. The appellants, however, argued that they were entitled to a judgment of liability as a matter of law because res judicata required the Court of Federal Claims to accept the Fifth Circuit's liability holding.

The court rejected the appellants' argument that it was bound by the Fifth Circuit's decision, reasoning that neither res judicata nor collateral estoppel prohibited it from considering the government's prior breach defense. The court concluded that "res judicata presumes that the first court had jurisdiction over the claim ... [and the] Fifth Circuit clearly recognized that it was up to this court to rule on the contract question." *Id.* at 188. The Court of Federal Claims further explained that "[a]lthough collateral estoppel bars the government from challenging HUD's breach [for failure to consider the appellants' rent increase request], collateral estoppel does not bar the government from defending that breach based on prior material breach" because the Fifth Circuit did not decide the issue. *Id.* at 189. On the merits, the court found that the appellants committed a prior material

breach that protected the government against liability for HUD's subsequent assumed breach because the appellants had not provided any evidence to rebut "the fact that Mockingbird Run Apartments were involved in the [MAGI] scheme ... [and] that Wilshire Investments, the general partner in the Christopher Village Limited Partnership, was part of the fraud." *Id.* at 187 n. 4. The court concluded that "the fraudulent conduct of MAGI and Wilshire, in connection with the rent requests for the Mockingbird Run Apartments, constitutes a prior material breach of the HUD contracts which justifies HUD's termination of the plaintiffs' contract for default." *Id.* at 190. The court held that this prior material breach excused HUD's assumed subsequent breach, "even though the U.S. government was not aware of the facts at the time of the foreclosure at issue in this litigation." *Id.* at 189. Finally, the court held that there was no settlement bar to the government's defense of prior material breach. *Id.* at 191.

Christopher Village and its managing general partner, Wilshire, appeal. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review the Court of Federal Claims' grant of summary judgment without deference. *Agwiak v. United States,* 347 F.3d 1375, 1377 (Fed.Cir.2003).

I

Appellants argue first that the Fifth Circuit's decision "is res judicata" and precludes the government from challenging its liability for

breach. (Appellants' Br. at 32.) Appellants therefore contend that the Fifth Circuit's decision entitles them to judgment as a matter of law on the breach of contract claim. We disagree.

[1][2] Initially, we must determine whether the Fifth Circuit had jurisdiction to issue a judgment as a "predicate" to a suit in the Court of Federal Claims. *See* Restatement (Second) of Judgments, at 13 (1982); *see also id.* at 19. As we recently reaffirmed in *Fieldturf, Inc. v. Southwest Recreational Indus., Inc.*, 357 F.3d 1266, 1268 (Fed.Cir.2004), in circumstances such as these, the court of appeals' jurisdiction is dependent on the district court's jurisdiction. *See* 28 U.S.C. § 1291. Accordingly, the Fifth Circuit had jurisdiction to issue this "predicate" judgment only if a district court would have had jurisdiction to issue such an order.

***1327** [3] In order for a district court to have properly had jurisdiction, the government must have waived sovereign immunity to suit. As the Supreme Court recently noted in *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003), "[j]urisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity ... together with a claim falling within the terms of the waiver." *See also United States v. Mitchell,* 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."); *United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941) ("The terms of [the sovereign's]

consent to be sued in any court define that court's jurisdiction to entertain the suit."); *Consol. Edison Co. v. United States,* 247 F.3d 1378, 1382 (Fed.Cir.2001) ("To invoke the jurisdiction of a federal court for relief from monetary obligations imposed by a federal agency, a litigant must show that the United States has waived sovereign immunity."). The APA has "broaden[ed] the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by" its provisions. *Bowen v. Mass.,* 487 U.S. 879, 891-92, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988); *see also Darby v. Cisneros,* 509 U.S. 137, 153, 113 S.Ct. 2539, 125 L.Ed.2d 113 (1993). But the waiver of sovereign immunity under the APA is limited. *See, e.g., Bowen,* 487 U.S. at 904 n. 39, 108 S.Ct. 2722.

[4] The APA waives sovereign immunity for suits to "set aside agency action ... found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(a) (2000), when the suit calls for "relief other than money damages," *id.* § 702, but only if "there is *no other adequate remedy,*" *id.* § 704 (emphasis added). This limits the government's waiver of sovereign immunity to situations in which "no other adequate remedy" exists. *Bowen,* 487 U.S. at 902, 108 S.Ct. 2722. Here, the necessary waiver of sovereign immunity existed as to the appellants' claim for injunctive relief because no other adequate remedy existed to prevent the foreclosure and sale. Thus, there is no question that the District Court for the Southern District of Texas properly had jurisdiction over the original action to enjoin foreclosure by the government. But, as the Fifth Circuit correctly held, the claim that originally

formed the basis for this jurisdiction under the APA, namely the request to enjoin HUD's foreclosure and sale, became moot when HUD foreclosed on and sold Mockingbird Run. *Christopher Vill.*, 190 F.3d at 314. At that point, the appellants' sole claim was for a declaratory judgment as to the legality of HUD's actions, and jurisdiction over this claim turned on whether the APA waived the United States' sovereign immunity to suit for such a declaratory judgment. This depended on whether suit in the Court of Federal Claims for money damages constituted an "adequate remedy" under section 704 of the APA.

We held in *Consolidated Edison* that a litigant's ability to sue the government for money damages in the Court of Federal Claims is an "adequate remedy" that precludes an APA waiver of sovereign immunity in other courts. 247 F.3d at 1384. The plaintiff in *Consolidated Edison* sued the government in the United States District Court for the Southern District of New York under the APA for declaratory and injunctive relief, alleging that the special assessments imposed by the Energy Policy Act of 1992 ("EPACT") violated due process and constituted a taking under the Fifth Amendment. *Id.* at 1380. The government ***1328** moved to have the case transferred to the Court of Federal Claims, but the district court denied the transfer. *Id.* at 1381- 82. The plaintiff appealed this denial of transfer to our court pursuant to 28 U.S.C. § 1292(d)(4)(A), which gives our court exclusive jurisdiction over an appeal from a district court's denial of a motion to transfer to the Court of Federal Claims. We held that the district court lacked jurisdiction under section 704 of the APA because "[e]very legal issue that [the plaintiff sought] to

resolve in this district court case could [have been] ... decided in a suit before the Court of Federal Claims ... [and] a refund of the EPACT payments could [have] provide[d] an *adequate remedy* " for the plaintiff. *Id.* at 1385 (emphasis added). We further emphasized in *Consolidated Edison* that, "[a] party may not circumvent the Claims Court's exclusive jurisdiction by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States." *Id.* (quoting *Rogers v. Ink,* 766 F.2d 430, 434 (10th Cir.1985)); [FN2] *see also Kanemoto v. Reno,* 41 F.3d 641, 646 (Fed.Cir.1994) ("[R]elief available for [the plaintiff's] claims in the Court of Federal Claims is 'adequate' ... [and the plaintiff] cannot escape this conclusion merely by framing her claim for relief in declaratory or injunctive terms....").

> FN2. In *Consolidated Edison,* we explained that this conclusion was consistent with the Supreme Court's reasoning in *Bowen.* In *Bowen,* the Court held that the Court of Federal Claims does not always present an "adequate remedy" to defeat APA jurisdiction in suits for monetary relief, reasoning that it was "not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief...." 487 U.S. at 905, 108 S.Ct. 2722. However, we held in *Consolidated Edison* that "*Bowen* ... does not enunciate a broad rule that the Court of Federal Claims cannot supply an adequate remedy in any case seeking injunctive relief." *Consol. Edison,* 247 F.3d

> at 1383. Rather, *Bowen* "linked its judgment to a specific set of circumstances" where the monetary relief sought implicated the potential for prospective relief as well and "involv[ed] state governmental activities that a district court would be in a better position to understand and evaluate." *Id.* at 1384 (quoting *Bowen,* 487 U.S. at 907-08, 108 S.Ct. 2722).

Our sister circuits have come to the same conclusion. *See, e.g., Deaf Smith County Grain Processors, Inc. v. Glickman,* 162 F.3d 1206, 1210-11 (D.C.Cir.1998) ("[T]he Tucker Act--which waives sovereign immunity and provides the United States Court of Federal Claims (Claims Court) with jurisdiction over certain claims for monetary relief from the federal Government, *see* 28 U.S.C. § 1491--provides an adequate remedy' in the Claims Court, which would preclude district court jurisdiction under § 704 of the APA."); *Randall v. United States,* 95 F.3d 339, 346 (4th Cir.1996) ("[R]eview under the APA is available only for 'final agency action *for which there is no other adequate remedy in a court* ' ... This limitation has been interpreted to preclude review under the APA when a plaintiff has an adequate remedy by suit under the Tucker Act.... Therefore, to determine whether Plaintiff's suit is cognizable under the APA, the court must first examine whether he has an available remedy under the Tucker Act.") (emphasis in original); *Marshall Leasing, Inc. v. United States,* 893 F.2d 1096, 1099 (9th Cir.1990) ("A party may not avoid the [Court of Federal Claims'] jurisdiction by framing an action against the federal government that appears to seek only

equitable relief when the party's real effort is to obtain damages in excess of $10,000"); *Rogers*, 766 F.2d at 434 ("A party may not circumvent the Claims Courts' exclusive ***1329** jurisdiction by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States.").

The Fifth Circuit itself has repeatedly emphasized the limited nature of the APA's waiver of sovereign immunity where there is an adequate remedy in the Court of Federal Claims. For example, in *Warner v. Cox*, 487 F.2d 1301 (5th Cir.1974), the Fifth Circuit held that it did not have jurisdiction to grant an injunction compelling the Navy to make certain contractual payments. *Id.* at 1307. Despite the contractor's argument that his "sole claim below was for review of administrative errors committed in the process of [the Navy] refusing" his payments, the court found that "[n]one of the substantive claims presented to the court below concerned anything but the payment of money...." *Id.* at 1304. The Fifth Circuit reasoned:

> [T]he APA does not provide for review under such circumstances. Specifically exempted from review is agency action for which there is some "... other adequate remedy in a court." 5 U.S.C. § 704. Suit under the Tucker Act in the Court of Claims has been held such an adequate remedy.... Congress' judgment seems to be that Tucker Act relief is adequate ... and to that judgment we defer.

Id. As such, the Fifth Circuit remanded with instructions to dismiss for want of jurisdiction, stating, "[w]e are in Court of Claims country where we do not belong." *Id.* at 1307.

In *Drake v. Panama Canal Commission,* 907 F.2d 532 (5th Cir.1990), the Fifth Circuit refused to entertain an APA claim for mandamus relief to require the Panama Canal Commission to pay certain survivor compensation. The Fifth Circuit held that "because ... the substance of the complaints at issue is a claim for money damages, appellant's case is not one covered by section 702, and, hence, sovereign immunity has not been waived. As a result, the APA does not afford jurisdiction over appellants' suit." *Id.* at 535. More recently in *Armendariz-Mata v. Department of Justice,* 82 F.3d 679 (5th Cir.1996), the Fifth Circuit stressed that "when the substance of the complaint at issue is a claim for money damages, the case is not one covered by § 702, and hence, sovereign immunity has not been waived" and the court does not have jurisdiction to entertain it. *Id.* at 682 (citation omitted). Because the Fifth Circuit lacked jurisdiction to award relief, the appeal should have been dismissed. *See City of Erie v. Pap's A.M.,* 529 U.S. 277, 287, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000); *Church of Scientology v. United States,* 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992).

There is no question that the appellants here could have originally sued the United States in the Court of Federal Claims to recover for breach of contract. Indeed, that is the very premise of the Fifth Circuit's "predicate" decision. Under these circumstances we must conclude that the Fifth Circuit lacked jurisdiction over the action for declaratory judgment because the APA did not waive the United States' sovereign immunity for such a suit in district courts.

II

[5][6] However, the fact that a court did not have jurisdiction over a suit in which it issued a decision does not automatically strip that decision of preclusive effect. In most circumstances a judgment may not be collaterally attacked on the ground that the original tribunal lacked subject matter jurisdiction, even if the issue ***1330** of subject matter jurisdiction has not been litigated in the first action. *See, e.g., Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 n. 9, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) (explaining that principles of res judicata apply to issues of subject matter jurisdiction, and that "[a] party that has had an opportunity to litigate the question of subject matter jurisdiction may not ... reopen that question in a collateral attack upon adverse judgment"); *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n,* 455 U.S. 691, 708-10, 102 S.Ct. 1357, 71 L.Ed.2d 558 (1982); *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 377-78, 60 S.Ct. 317, 84 L.Ed. 329 (1940); *Swift & Co. v. United States,* 276 U.S. 311, 326, 48 S.Ct. 311, 72 L.Ed. 587 (1928). The Restatement similarly notes that a court's "judgment precludes the parties from litigating the question of the court's subject matter jurisdiction" on collateral review. Restatement (Second) of Judgments § 12 (1982). The Restatement, however, also recognizes exceptions to this rule, including when "[a]llowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government." *Id.* § 12(2); *see In re Bulldog Trucking, Inc. v. Productive Transp. Servs., Inc.,* 147 F.3d 347, 354 (4th Cir.1998); *Sterling v. United States,* 85 F.3d 1225, 1231 (7th Cir.1996).

Kalb v. Feuerstein, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940), involved just the type of situation described in the Restatement's exception. *See* Restatement (Second) of Judgments § 12, note on cmt. d at 127 (citing *Kalb*); *see also Blinder, Robinson & Co., Inc. v. S.E.C.,* 837 F.2d 1099, 1104 (D.C.Cir.1988). In *Kalb* the appellant was a farmer who had filed a petition in the Bankruptcy Court "for composition and extension of time to pay his debts" under the Frazier-Lemke Act, Pub.L. No. 73-486, 75(s), 48 Stat. 1289 (1934) (formerly codified at 11 U.S.C. 203(s)) (repealed 1949). *Kalb,* 308 U.S. at 435-36, 60 S.Ct. 343. The Act was designed to provide relief for farmer-debtors, and it explicitly prohibited other courts from instituting or continuing foreclosure proceedings against a farmer who filed a petition under the Act in the Bankruptcy Court. *Id.* at 440-41, 60 S.Ct. 343 (quoting the Frazier-Lemke Act, 11 U.S.C. § 203(n)-(p)). [FN3] Nevertheless in violation of the Act's automatic stay, the Wisconsin County Court entered a mortgage foreclosure proceeding against the appellant; confirmed the sheriff's sale of his property; and ordered the appellant dispossessed. *Id.* at 436, 60 S.Ct. 343. The farmer did not directly appeal the Wisconsin County Court's decision. Instead, he instituted a separate action in the Circuit Court of Walworth County, Wisconsin for "restoration of possession." *Id.* He argued that once he filed his petition in the Bankruptcy Court, the Frazier-Lemke Act automatically stayed proceedings in the Wisconsin County Court, and the Wisconsin County Court therefore did not have jurisdiction to proceed with the foreclosure proceeding. *Id.* at 437, 60 S.Ct. 343. The Wisconsin Supreme Court rejected this argument,

holding that it need not consider whether the Frazier-Lemke Act imposed an automatic stay on state court proceedings because "[n]o appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim ***1331** that the order ... is void." *Id.* at 438, 60 S.Ct. 343 (quoting language from the Wisconsin Supreme Court).

> FN3. A similar automatic stay provision exists in the current Bankruptcy Act. 11 U.S.C. § 362 (2000).

The United States Supreme Court reversed. The Court found that "considerations as to whether the issue of jurisdiction was actually contested in the County Court, or whether it could have been contested, are not applicable." *Id.* at 444, 60 S.Ct. 343. The Court detailed the history of Congress' decision to grant bankruptcy courts exclusive jurisdiction in Frazier-Lemke cases, and it concluded that, "Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised." *Id.* The Court held that the Wisconsin County Court's action "was not merely erroneous but was beyond its power, void, and subject to collateral attack." *Id.* at 438, 60 S.Ct. 343. The *Kalb* holding would appear to apply equally to Congress' decision to grant exclusive jurisdiction to other courts, such as the Court of Federal Claims, and thereby render void a judgment that treads upon that exclusive jurisdiction.

The Supreme Court's decision in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940), is even more closely on point. In *Fidelity & Guaranty*, a coal company was involved in a bankruptcy proceeding in the United States District Court for the Western District of Missouri, and the United States, as a trustee for the Choctaw and Chickasaw Nations ("the Nations"), filed a claim for lease royalties. *Id.* at 510, 60 S.Ct. 653. The coal company responded with a cross-claim for credits against the Nations. The Missouri district court granted the Nations' claim in part and allowed the cross-claim in full, decreeing an overall balance in favor of the coal company. *Id.* The government did not appeal this decision. However, the government had filed a separate action in the United States District Court for the Eastern District of Oklahoma against the coal company's surety for the same royalties involved in the Missouri proceeding. *Id.* In the Supreme Court the government conceded that its claim for royalties was decided in the previous action, but it argued that the affirmative judgment on the cross-claim should not be enforced because the Missouri district court lacked jurisdiction to adjudicate a claim for affirmative relief against the Nations because of sovereign immunity, and the affirmative judgment was therefore not entitled to preclusive effect. *Id.* at 511, 60 S.Ct. 653. The Oklahoma district court and the Tenth Circuit held that the Missouri decision on the cross-claim was preclusive and that the government could not collaterally attack the judgment. *Id.* The Supreme Court reversed. The Court explained that a cross-claim against the Nations was comparable to a claim against the United States and was barred by sovereign immunity unless brought in the

appropriate court, and Congress had not waived the Nations' sovereign immunity in the Missouri district court. *Id.* at 513, 60 S.Ct. 653. Accordingly, the Court held that the earlier "Missouri judgment [was] void ... [because] cross-claims against the [Indian Nations] are justiciable only in those courts where Congress has consented to their consideration," *id.* at 512, 60 S.Ct. 653, namely a "United States court in the Indian Territory," *id.* at 513, 60 S.Ct. 653 (quoting the Act of April 26, 1906, Pub.L. No. 59-129, § 18, 34 Stat. 137, 144). Finally, the Court held that the Missouri district court's judgment on the cross-claim was "subject to collateral attack" because it was "void" and was not entitled to preclusive effect. *Id.* at 514, 60 S.Ct. 653. The Court explained:

> Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial ***1332** power is void. The failure of officials to seek review cannot give force to this exercise of judicial power. Public policy forbids suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.
>
> *Id.*

In *Durfee v. Duke,* 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963), the Supreme Court cited both *Kalb* and *Fidelity & Guaranty* for the proposition that the "doctrine[ ] of ... sovereign immunity may in some contexts be controlling" and allow a party to collaterally attack the jurisdiction of a court, thereby overriding the res judicata effect of the court's decision. *Id.* at 114, 84 S.Ct. 242. The Seventh Circuit, in *United States v. County of Cook,* 167 F.3d 381 (7th Cir.1999), noted that *Fidelity &*

Guaranty "permits the United States to ignore proceedings instituted against it in the wrong court" because such decisions are void. *Id.* at 390. Likewise, our court concluded in *International Air Response v. United States,* 324 F.3d 1376 (Fed.Cir.2003), that *Fidelity & Guaranty* teaches to override the res judicata effect of a prior opinion when its issuing court's lack of jurisdiction "directly implicat[es] issues of sovereign immunity." *See id.* at 1380.

III

Respect for the exclusive jurisdiction of the Court of Federal Claims is no less important than respect for the exclusive jurisdiction of the bankruptcy courts in *Kalb* or that of the Indian Territory courts in *Fidelity & Guaranty.* The history of the Court of Federal Claims' jurisdiction over suits under the Tucker Act emphasizes the importance that Congress ascribed to the exclusive nature of that jurisdiction. In 1887, Congress amended the Court of Federal Claims' jurisdiction to include "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages not sounding in tort." 28 U.S.C. § 1491 (2000). This provision has come to be known as the Tucker Act. [FN4] The 1887 Act also included a provision known as the Little Tucker Act that gave district courts concurrent jurisdiction with the Court of Claims over suits against the government in certain instances. 24 Stat. 505 (codified as amended at 28 U.S.C. § 1346 (2000)). [FN5] As the Supreme

Court has held, the obvious implication of these acts is that Congress intended the Court of Federal Claims to have

> FN4. When asked to clarify the purpose of this grant of exclusive jurisdiction to the Court of Federal Claims, Congressman J.R. Tucker, the namesake of the act, explained that "[u]pon full consideration by the committee it was thought that where a claim exceeded $10,000 it would be better and safer for the Government it should be where the head of the Department may be present to protect the Government." 49 Cong. Rec. 624 (1887).

> FN5. The Little Tucker Act reads as follows:
> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of ... [a]ny ... civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort....
> 28 U.S.C. § 1346 (2000).

exclusive jurisdiction to render judgment upon any claim against the United States for money damages exceeding $10,000 that is founded either upon the Constitution, or any Act of Congress or ***1333** any regulation of an executive department,

> or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort ... unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute.

See Eastern Enters. v. Apfel, 524 U.S. 498, 520, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (internal quotations omitted); *see also Clinton v. Goldsmith,* 526 U.S. 529, 539 n. 13, 119 S.Ct. 1538, 143 L.Ed.2d 720 (1999) ("Under the Tucker Act, the Court of Federal Claims has exclusive jurisdiction over nontort claims against the government for greater than $10,000."). [FN6]

> FN6. To be sure, jurisdiction is only exclusive if the Court of Federal Claims can award full relief. The jurisdiction is not exclusive where " § 702 of the APA is construed to authorize a district court to grant monetary relief" as part of broader relief, and the "purely monetary aspects of the case could have been decided in the Claims Court." *Bowen,* 487 U.S. at 910 n. 48, 108 S.Ct. 2722. But, as discussed above, section 704 precludes district court jurisdiction in this case, and the Court of Federal Claims' jurisdiction is exclusive.

In the light of this history, we see no basis for distinguishing the Supreme Court's decisions in *Kalb* or *Fidelity & Guaranty.* Although we are reluctant to conclude that one of our sister circuits has acted beyond its jurisdiction, we find that it plainly did so here. The Fifth Circuit's ruling, like the ones at issue in *Kalb* and *Fidelity & Guaranty,*

did not merely exceed the court's jurisdiction, it "directly implicat[ed] issues of sovereign immunity" and is therefore void. *See Int'l Air Response,* 324 F.3d at 1380. Because the Fifth Circuit's judgment is void, it is not entitled to preclusive effect, despite the fact that the court's jurisdiction was not challenged on direct review. *See* Restatement (Second) of Judgments, at 13 (1982); *see also id.* at 19. We accordingly reject the appellants' argument that the Fifth Circuit's decision conclusively determined the government's liability. The Fifth Circuit's judgment is void as to the contract issues that could have been decided and also as to those contract issues actually decided.

IV

[7] We turn now to the question whether the Court of Federal Claims correctly granted summary judgment in favor of the government on the appellants' contract claim. The Court of Federal Claims correctly declined to afford res judicata effect to the Fifth Circuit's decision, but it erred in ascribing collateral estoppel effect to the contract issues decided by the Fifth Circuit. Those issues should have been decided de novo by the Court of Federal Claims. However, while we doubt the correctness of the Fifth Circuit's decision that the government breached in refusing to consider the appellants' rent increase request, we are reluctant to address the question of the government's breach on the current record. The government did not move for summary judgment on that ground. *See Christopher Vill.,* 53 Fed.Cl. at 183. Rather, the government moved for summary judgment on the ground that, even assuming a government breach in 1995, the government was not liable because the

appellants committed prior material breaches in 1992, 1994, and 1995 by submitting false data to HUD in connection with Mockingbird Run. *Id.* The Court of Federal Claims, agreeing with the government, held that the MAGI Plea Agreement established that the appellants had submitted false claims for rent increases to the government "in violation of HUD regulations and specific terms of the HAP contract with [the appellants], which prohibited the submittal of, 'any false statements ***1334** or misrepresentations to HUD in connection with HUD mortgage insurance, loan processing or administration of the contract.' " *Id.* at 186 (quoting HAP Contract (App. at 2104)).

[8] When "a party to a contract ... is sued for its breach [it] may ordinarily defend on the ground that there existed, at the time [of the breach], a legal excuse for nonperformance...." *Coll. Point Boat Corp. v. United States,* 267 U.S. 12, 15, 45 S.Ct. 199, 69 L.Ed. 490 (1925); *see also Sun Studs, Inc. v. ATA Equip. Leasing, Inc.,* 872 F.2d 978, 992-93 (Fed.Cir.1989). In resolving disputes among parties who each claim that the other has breached, courts will "[o]ften ... impose liability on the party that committed the *first material breach.*" E. Allen Farnsworth, *Farnsworth on Contracts* § 8.15, at 439 (1990) (emphasis in original). The Restatement explains that this doctrine of first material breach, or prior material breach, is "based on the principle that where performances are to be exchanged under an exchange of promises, each party is entitled to the assurance that he will not be called upon to perform his remaining duties ... if there has already been an uncured material failure of performance by the other party." Restatement (Second) of Contracts § 237b, cmt. b (1981). A later breach "is justified

... by the other party's [prior] failure." *Id.; see also Sun Studs,* 872 F.2d at 992 (citing this provision of the Restatement in a discussion of the doctrine of prior material breach).

[9] The appellants urge that MAGI's Plea Agreement cannot establish a prior material breach by the appellants because neither Christopher Village nor its general partner Wilshire was a party to the Plea Agreement; because the government has not established that the appellants intended to defraud HUD when they submitted inflated rent requests; because any breach that the appellants may have committed through these false submissions was immaterial; and because, even if these false submissions constituted a material breach by the appellants, the government was unaware of them at the time HUD breached.

We think that the documentation submitted by the government on its motion for summary judgment did not support the Court of Federal Claims' finding "that Wilshire Investments, the general partner in the Christopher Village Limited Partnership, was part of the [MAGI] fraud." *Christopher Vill.,* 53 Fed.Cl. at 187 n. 4. Nonetheless, although it is true that the Plea Agreement did not directly implicate Christopher Village or Wilshire in the fraud, the existence of the false statements concerning Mockingbird Run is undisputed. On summary judgment the appellants conceded that false data concerning insurance premiums were submitted to the government in connection with the Mockingbird Run rent increase requests, and that these requests caused the government to make unjustified payments to the appellants. *Id.* at 189 ("The plaintiffs do not dispute that they submitted false

certifications in support of their rent increase requests and that plaintiffs used HUD funds to pay for, at least in part, illegally-inflated insurance costs."). The appellants reiterated this concession at oral argument in our court. It is also clear that the appellants violated both the Regulatory Agreement and the HAP Contract by submitting these inflated rent increase requests, contrary to contract provisions that prohibited the submission of "false statements or misrepresentations to HUD in connection with HUD mortgage insurance," HAP Contract ¶ 26 (App. at 2404). [FN7]

> FN7. The Court of Federal Claims also properly held:
> The undisputed facts establish that [the appellants] violated the following Regulatory Agreement provisions: (1) the prohibition on disbursement of project funds for anything other than "reasonable operating expenses and necessary repairs"; and (2) the requirement that "payment for services, supplies, or materials shall not exceed the amount ordinarily paid for such services, supplies or materials in the area where the services are rendered." In addition, these illegally-inflated insurance charges violated the [appellants'] HAP contract, which required justifications of the reasonableness ... of those expenses. *Christopher Vill.*, 53 Fed.Cl. at 189.

***1335** While the government has not established that Christopher Village and Wilshire specifically intended to defraud HUD, proof of fraudulent intent

by Wilshire or Christopher Village is not necessary to establish the appellants' breach in this case. The appellants' contrary contentions are based on a fundamental misunderstanding of the government's prior material breach defense. The appellants claim that the plaintiff's intent to defraud must be proven under 28 U.S.C. § 2514, a statute providing that a plaintiff's fraud can cause a forfeiture of its claim against the government. [FN8] This statute, however, is not the basis for the government's argument, and the government never mentioned the statute in its brief. The Court of Federal Claims did not hold, and the government did not urge, that the appellants' inflated rent requests caused the appellants to forfeit their breach of contract claim against the government. Rather, the question is whether as a matter of contract law the government can defend against a subsequent breach by pointing to the appellants' prior breach.

> FN8. The statute reads: A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.
> In such cases the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture.
> 28 U.S.C. § 2514 (2000).

The contract law question is whether the appellants' established and uncontroverted breach was sufficiently material so as to justify the

government's subsequent breach. The appellants correctly cite our decision in *Thomas v. Department of Housing & Urban Development,* 124 F.3d 1439, 1442 (Fed.Cir.1997), for the proposition that "[o]nly material breaches can justify the government's rescinding a contract." (Appellants' Br. at 46.) The appellants reason that their false submissions concerned an amount of money that was too small to be material. [FN9] We disagree with the appellants' conclusion that their breach was not material.

> FN9. The appellants contend that MAGI's illegal scheme cost Christopher Village, and in turn HUD, "roughly $1,500 per year." (Appellants' Br. at 47.) The government, however, challenges this, arguing that the appellants cite "no evidence" for the $1,500 figure. (Br. of Def.-Appellee at 42).

At the outset, we note that our case law holds that any degree of fraud is material as a matter of law. *Joseph Morton Co., Inc. v. United States,* 757 F.2d 1273, 1278 (Fed.Cir.1985). This is particularly true in light of Congress' express prohibition of kickbacks reflected in the Anti-Kickback Act of 1986, 41 U.S.C. § § 51-58 (2000). *See United States v. Acme Process Equip. Co.,* 385 U.S. 138, 144-45, 87 S.Ct. 350, 17 L.Ed.2d 249 (1966). Our court, in turn, has "underscore[d] the necessity for the Government to be secure in its confidence in its contractors." *Joseph Morton,* 757 F.2d at 1278.

[10] Although the appellants may not themselves have participated in the fraud ***1336** on HUD, their

false submissions were unarguably a function of MAGI's fraud, and MAGI and the appellants were commonly controlled. It was uncontested at summary judgment in the Court of Federal Claims that MAGI and Wilshire had the same president, the same sole director, and the same sole shareholder. (Defendant's Supplemental Proposed Findings of Fact, *Christopher Vill., L.P. v. United States,* No. 99-775C (Fed.Cl.) (citing, among other things, the appellants' 1992, 1993, and 1995 rent increase requests, which listed MAGI as a limited partner of Christopher Village).) We think that the submission of false data generated by companies under common control with the contractor constitutes a material breach as a matter of law at least when the commonly controlled company generated those data in a conscious effort to defraud the government.

Case law regarding the materiality requirement under the False Statements Act, 18 U.S.C. § 1001 (2000), is instructive in this respect. This Act imposes a criminal penalty on "whoever ... knowingly or willfully ... makes any materially false, fictitious or fraudulent statements or representations" to a government agency. *Id.* Courts are generally in agreement that the Act only imposes liability for material misstatements, and that "[t]he test of the materiality of a statement is whether a statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made." *United States v. DiFonzo,* 603 F.2d 1260, 1266 (7th Cir.1979), *cert. denied,* 444 U.S. 1018, 100 S.Ct. 672, 62 L.Ed.2d 648 (1980) (internal quotation marks omitted); *United States v. Krause,* 507 F.2d 113, 118 (5th Cir.1975); *United States v. Deep,* 497 F.2d 1316, 1321 (9th

Cir.1974) (explaining that the materiality test asks whether the false statement "could affect or influence the exercise of governmental functions,--does it have a natural tendency to influence or is it capable of influencing agency decision" (citing *United States v. East,* 416 F.2d 351, 353 (9th Cir.1969)); *Blake v. United States,* 323 F.2d 245, 246 (8th Cir.1963); *Gonzales v. United States,* 286 F.2d 118, 122 (10th Cir.1960)). This authority suggests that efforts to defraud the government that are or may be successful are particularly culpable. Here, the appellants submission of inflated insurance costs directly influenced HUD in making a determination [it was] required to ... ma[ke], *see DiFonzo,* 603 F.2d at 1266. The whole purpose of these submissions was to influence HUDs determination on the appellants rent increase requests. For example, when the appellants submitted their final rent increase request in 1995, their accompanying letter stated that [t]he reasons for the proposed rent increase are as follows ... Increase in salaries, by adding the position of a service coordinator, and *property insurance,* and utility rates. (App. at 2801) (emphasis added). The false statements were successful in securing rent increases. Thus, the appellants committed a material breach as a matter of law by submitting false data that was generated by MAGI, a company under common control, in a successful effort to defraud the government. This breach of contract was plainly material.

The appellants also contend that the MAGI illegal kickback scheme cannot form the basis of a prior material breach by the appellants because the government was unaware of this scheme at the time of HUD's alleged breach. Our precedent, however,

clearly supports the Court of Federal Claims' finding that the appellants' prior breach excused HUD's subsequent breach "even though the U.S. government was not aware of the facts at the time of the foreclosure at issue in this ***1337** litigation." *Christopher Vill.*, 53 Fed.Cl. at 189. For example, in *Joseph Morton* the question was whether the contractor was properly terminated for default based on information later discovered by the government. *See* 757 F.2d at 1275. A few years after the default termination, the contractor was convicted of conspiring to defraud the government by submitting false cost statements under the contract, related to a period before the default termination. *Id.* We held that the interceding events justified the default termination because "[i]t is settled law that a party can justify a termination if there existed at the time an adequate cause, even if then unknown." *Id.* at 1277 (quoting *Pots Unlimited, Ltd. v. United States*, 220 Ct.Cl. 405, 600 F.2d 790, 793 (1979)); *see also Kelso v. Kirk Bros. Mech. Contractors, Inc.*, 16 F.3d 1173, 1175 (Fed.Cir.1994) ("This court sustains a default termination if justified by circumstances at the time of termination, regardless of whether the Government originally removed the contractor for another reason.").

V

Finally, the appellants argue that even assuming that the MAGI illegal kickback scheme constituted a material breach on their part, two other agreements that were part of the MAGI settlement prohibit the government from relying on that breach as a defense in the present litigation. While Wilshire was not a party to the Plea Agreement, it was a party to the Administrative Agreement and

the Consent Judgment, executed at the same time. In support of this contention, the appellants urge that both agreements bar the government's defense. The appellants point to the provision of the Administrative Agreement that states, "HUD will not seek civil money penalties ... for any conduct alleged as the basis for liability in the civil or criminal action, for the financial defaults resulting in the foreclosure of HUD properties prior to the date of this Agreement." (App. at 253.) The appellants also highlight the provision of the Consent Judgment that states that the Government agreed to "release All Defendants from any administrative monetary or civil monetary claim that the United States or HUD has or may have under ... any ... statute [s] or common law theories creating causes of action for civil damages or civil penalties for submitting or causing to be submitted claims to the government, for the Covered Conduct." (App. at 234-35.) We disagree. The Court of Federal Claims properly held:

> [W]hile the United States agreed to forego taking any further *affirmative* enforcement actions--to either seek further penalties or to continue to press affirmative suits--against Wilshire, the Global Settlement says nothing regarding the government's ability to *defend* itself from claims levied by parties involved in the action.

Christopher Vill., 53 Fed.Cl. at 191 (emphasis in original).

We conclude that the Court of Federal Claims correctly decided that the appellants engaged in a material breach of the Regulatory Agreement and the HAP Contract prior to HUD's assumed breach. We also agree that the Court of Federal Claims correctly decided that this breach barred the

appellants from recovering on the government's breach of contract.

VI

Finally, there is the question whether the Court of Federal Claims properly denied class certification. As we held in *Greenbrier v. United States*, 193 F.3d 1348 (Fed.Cir.1999), the appellants' class certification "issue is moot in light of our holdings that the government is not liable to ***1338** the [appellants] for breach of contract." *Id.* at 1360; *see also Gollehon Farming v. United States*, 207 F.3d 1373, 1382 (Fed.Cir.2000).

CONCLUSION

For the foregoing reasons we affirm the Court of Federal Claims' grant of summary judgment in favor of the government.

AFFIRMED.

COSTS

No costs.

United States Court of Appeals,
Fifth Circuit.

CHRISTOPHER VILLAGE, LIMITED PARTNERSHIP; Wilshire Investments Corporation,
Plaintiffs-Appellants,
v.
Nicholas P. RETSINAS; et al., Defendants,
Nicholas P. Retsinas; Albert Cason, Director Multifamily Housing Management;
The Honorable Andrew M. Cuomo, Secretary of Housing and Urban Development;
Henry Cisneros, Defendants-Appellees.

No. 98-20181.

Sept. 15, 1999.

Owners and managers of federally subsidized low income housing complex brought action against government officials, alleging that the Department of Housing and Urban Development (HUD) caused plaintiffs to default on their obligation to maintain the property by denying necessary rent increases and that HUD illegally demanded $2 million equity contribution. The United States District Court for the Southern District of Texas, Melinda Harmon, J., 1998 WL 422854, granted summary judgment for officials, and plaintiffs appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) requests for injunctive relief and mandamus, but

not declaratory judgment, were rendered moot by foreclosure sale and transfer of property to city; (2) plaintiffs' challenge to HUD's refusal to entertain rent increase request and its demand of equity contribution was reviewable; (3) HUD's actions were arbitrary and capricious; and (4) claim that particular subsidy abatement violated due process was unreviewable.

Appeal dismissed as moot in part, affirmed in part, and reversed in part.

West Headnotes

[1] Federal Courts 723.1
170Bk723.1 Most Cited Cases

The mootness doctrine is grounded primarily and originally in the appellate court's inability to fashion relief.

[2] Federal Courts 723.1
170Bk723.1 Most Cited Cases

Ordinarily, an appeal will be moot when property underlying the dispute has been sold at a foreclosure sale because court cannot reverse the transaction and thus cannot fashion adequate relief.

[3] Federal Courts 724
170Bk724 Most Cited Cases

Foreclosure sale and transfer of low income housing

complex from Department of Housing and Urban Development (HUD) to city mooted request of property's former owners for injunction and mandamus, which would involve transfer of property, in action alleging that HUD unlawfully refused to entertain former owners' rent increase request and illegally demanded $2 million equity contribution, because Court of Appeals would be unable to fashion adequate relief.

[4] Federal Courts 724
170Bk724 Most Cited Cases

Request of former owners of low income housing complex for declaratory judgment, in action alleging that Department of Housing and Urban Development (HUD) unlawfully refused to entertain former owners' rent increase request and illegally demanded $2 million equity contribution, was not rendered moot by foreclosure sale and transfer of property from HUD to city, because, even without regaining title to property, former owners could use declaration as predicate for damages action against HUD.

[5] Federal Courts 12.1
170Bk12.1 Most Cited Cases

Where several forms of relief are requested and one of these requests subsequently becomes moot, court can still consider the remaining requests.

[6] United States 82(7)
393k82(7) Most Cited Cases

Although decision of Department of Housing and Urban Development (HUD) as to whether to grant or deny rent increase request for federally subsidized low income housing is unreviewable, due to lack of judicially manageable standards and HUD's need for flexible exercise of administrative discretion, HUD's refusal to entertain such request, along with its acts of threatening foreclosure and demanding $2 million equity contribution from owners of housing complex, were reviewable because owners alleged that HUD ignored a plain statutory duty, exceeded its jurisdiction or committed constitutional error. 5 U.S.C.A. § 701(a)(2).

[7] Administrative Law and Procedure 701
15Ak701 Most Cited Cases

An action is committed to agency discretion, and is thus unreviewable under Administrative Procedure Act, when no judicially manageable standards are available for judging how and when an agency should exercise its discretion. 5 U.S.C.A. § 701(a)(2).

[8] United States 82(3.5)
393k82(3.5) Most Cited Cases

Refusal of Department of Housing and Urban Development (HUD) to entertain request for rent increase by owners of federally subsidized low income housing complex, and HUD's related acts of declaring owners in default and demanding $2

million equity contribution, were arbitrary and capricious, in view housing program's objective that property's expenses be covered by rental rates, absence of evidence that property was mismanaged, and HUD's lack of statutory or regulatory authority to demand equity contribution. National Housing Act, § 704, as amended, 12 U.S.C.A. § 1747c; United States Housing Act of 1937, § 8(c)(2)(B), as amended, 42 U.S.C.A. § 1437f(c)(2)(B); 24 C.F.R. § 886.312(b).

[9] United States 82(7)
393k82(7) Most Cited Cases

Decision of Department of Housing and Urban Development (HUD) to abate single subsidy payment made to owner of federally subsidized low income housing complex, based on alleged failure to repair some units in complex, was unreviewable, upon owner's claim of due process violation, since owner's Housing Assistance Payment (HAP) contract gave HUD complete discretion regarding decisions to reduce subsidy. U.S.C.A. Const.Amend. 5; 5 U.S.C.A. § 701(a)(2).

***311** E. Grey Lewis, Washington, DC, Alan B. Daughtry, Strasburger & Price, Houston, TX, for Plaintiffs-Appellants.

Lowell V. Sturgill, Jr., Barbara C. Biddle, U.S. Department of Justice, Civil Division, Appellate Staff, Washington, DC, for Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, SMITH and EMILIO M. GARZA, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appellants Christopher Village, Ltd. and Wilshire Investments (collectively "Village"), owned and managed a federally subsidized low income housing complex in Bryan, Texas. They filed this suit contending that the Department of Housing and Urban Development (HUD) caused ***312** Village to default on its obligation to maintain the property by denying necessary rent increases and illegally demanded a multimillion-dollar equity contribution from Village. As the suit progressed, HUD reacquired and sold the property at foreclosure, and the apartment complex has been torn down. Nevertheless, as to the part of this case which is not moot, we hold that HUD's actions were arbitrary and capricious. Village is entitled to a partial declaratory judgment in its favor.

BACKGROUND

1. HUD Regulatory Scheme

The National Housing Act was enacted (and subsequently amended) to "assist private industry in providing housing for low and moderate income families and displaced families." 12 U.S.C.A. § 1715l (a) (West 1989). To foster private

investment, the Act authorizes HUD to insure private mortgage loans used to construct low income housing. *See* 12 U.S.C.A. § 1715l (d)(3) (West 1989). In addition, the Act and HUD regulations encourage private investment by allowing owners to borrow money at reduced interest rates, reducing a borrower's equity requirements, permitting owners to sign non-recourse notes, and, prior to the 1986 tax code changes, granting owners and investors generous tax benefits. *See generally, Kargman v. Sullivan,* 552 F.2d 2, 4 (1st Cir.1977). By granting owners these benefits, Congress sought to reduce the financial risk associated with operating low income housing by "reducing the rentals necessary to service the landlord's debt obligation." *Hahn v. Gottlieb,* 430 F.2d 1243, 1245 (1st Cir.1970); *see also Beck Park Apartments v. United States Dep't of Hous. and Urban Dev.,* 695 F.2d 366, 368 (9th Cir.1982).

In exchange for these financial benefits, HUD requires low income property owners to enter into "Regulatory Agreements" that give HUD extensive regulatory authority over the operation and maintenance of the property. *See* 12 U.S.C.A. § 1715l (d)(3). [FN1] Under a standard Regulatory Agreement, an owner must dedicate the property for medium or low income tenants, must remain a sole asset entity (i.e., may not engage in any business other than owning and operating the property), may not take a profit distribution over six percent per year, must adequately maintain the property, and may not increase rents without approval from HUD.

See Kargman, 552 F.2d at 4. If an owner violates the Regulatory Agreement, HUD may declare the property in default, accelerate the mortgage, and foreclose on the property. [FN2] HUD also sets the maximum allowable rent an owner can charge its tenants. In doing so, HUD is supposed to provide owners with sufficient funds to operate and maintain the property, service the debt, pay taxes, cover various reserve requirements, and provide the owner a reasonable return on investment. *See, e.g.*, 12 U.S.C.A. § 1747c (West 1989). [FN3] If rental revenues fail to cover these costs, an ***313** owner can request a rental increase from HUD. *See* 24 C.F.R. § 245.325.

FN1. Section 221(d)(3) requires owners to be "regulated or supervised ... by the Secretary under a regulatory agreement or otherwise, as to rents, charges, and methods of operation, in such form and in such manner as in the opinion of the Secretary will effectuate the purposes of this section."

FN2. HUD may exercise these remedies only if it holds the note. If the lender still holds the note, HUD can notify the lender of the default and request that it accelerate the mortgage and foreclose, or request that the note be assigned to HUD so it can do so.

FN3. 12 U.S.C.A. § 1747c states:

> Prior to approving the initial or any subsequent rent schedule pursuant to this section, the Secretary shall find that such schedule affords reasonable assurance that the rents to be established thereunder are (1) not lower than necessary, together with all other income to be derived from or in connection with the project, to produce reasonably stable revenues sufficient to provide for the payment of the operating expenses, the minimum annual amortization charge, and the minimum annual return; and (2) not higher than necessary to meet the need for dwellings for families of moderate income.

Since most tenants of low income housing are on welfare and cannot afford to pay the full contract rental price, Congress created the Section 8 housing program to subsidize their rent. *See* 42 U.S.C.A. § 1437f (West 1994). "Under the program, tenants make rental payments based on their income and ability to pay; [HUD] then makes 'assistance payments' to the private landlords in an amount calculated to make up the difference between the tenant's contribution and a 'contract rent' agreed upon by the landlord and HUD." *Cisneros v. Alpine Ridge Group,* 508 U.S. 10, 12, 113 S.Ct. 1898, 1900, 123 L.Ed.2d 572 (1993). Because the Section 8 program requires that a tenant pay a maximum of 30% of the gross rent, if HUD approves a rental increase, the majority of the increase is absorbed by HUD via the Section 8

subsidy. The subsidy is implemented through Housing Assistance Payment ("HAP") contracts entered into between HUD and the property owners which extensively regulate an owner's management of the property. HAP contracts set the maximum allowable rent an owner may charge and the subsidy amount paid by HUD and require owners to maintain the property in a safe and sanitary condition.

2. Factual and Procedural History

The property at issue in this case, Mockingbird Run Apartments, was built in 1970 from the proceeds of a § 221(d)(3) insured loan and was therefore subject to a Regulatory Agreement. Because Mockingbird was receiving Section 8 subsidies, the property was also subject to a HAP contract. When Village purchased Mockingbird in 1983, it assumed the obligations and benefits of both agreements.

By 1995, Mockingbird's physical condition had substantially deteriorated and approximately $2 million was needed to restore the property. HUD warned Village that a failure to refurbish the property could result in abatement of Section 8 subsidies and constituted a default under the Regulatory Agreement. The parties began negotiating plans to repair Mockingbird, including the issue who would fund the needed repairs. Each of several plans proposed by Village stipulated that HUD would increase the contract rent and Village would incur a large loan to be repaid out of the property's future rental revenues. HUD, however,

rejected the proposals, insisting instead that Village pay all of the $2 million repairs without any assistance from HUD.

In June 1995, Village formally requested that HUD increase its contract rent since Mockingbird's rental revenues were inadequate to reimburse its operating costs and the necessary maintenance and repairs. Without approving or denying the request, however, HUD replied by letter dated August 25, 1995, demanding that Village place the $2 million needed to pay for the repairs in escrow within 60 days or face default. On September 6, HUD reiterated its demand, cautioning that, although Village's rent increase request was under review, "no action will be taken at this time due to the provisions in the HUD letter dated August 25, 1995." Finally, on September 14, HUD notified Village that, since Village had not complied with the August 25, 1995 demand for $2 million and because Village had "violated paragraph eight of the Regulatory Agreement by not maintaining the mortgaged premises in good repair and condition," HUD would "proceed without further notice to take whatever remedies are appropriate". HUD intended to accelerate the mortgage and foreclose on the property. Indeed, on December 1, 1995, HUD assumed control of the property as a mortgagee in possession. [FN4]

FN4. On November 17, 1995, the original lender assigned the note and mortgage to HUD and collected the insurance proceeds.

Thus, HUD had the same remedial rights as the original lender.

***314** Village sued various HUD officers seeking a declaratory judgment, an injunction, and mandamus, arguing that HUD unlawfully refused to entertain its rent increase request, illegally demanded $2 million, and made it impossible for Village to maintain the property because of insufficient rental revenues. The district court, unmoved, ultimately denied all of Village's requested relief and granted summary judgment in favor of HUD. According to the court, HUD's rent increase decisions are unreviewable [FN5], and Village had an absolute obligation to maintain the property regardless whether it received sufficient rents to cover repair costs.

FN5. The court alternatively held that, even if reviewable, Village failed to show that HUD's actions were arbitrary and capricious.

After obtaining the favorable summary judgment, HUD slated the property for foreclosure sale. Although Village moved the district court to stay the sale pending appeal, the district court, and subsequently this court, rejected the motion and allowed the sale to proceed. HUD, as the only bidder, bought the property at the auction and eventually "sold" [FN6] it to the City of Bryan

Housing Authority, allegedly to be demolished and redeveloped as elderly and handicapped housing. [FN7]

FN6. The City of Bryan paid $10 for the property. That HUD was authorized to sell the property to the City of Bryan is not in dispute: "HUD may negotiate the sale of any project to an agency of the federal, State, or local government." 24 C.F.R. 290.13(a).

FN7. At oral argument, HUD represented to this court that it owned the property and had spent several million dollars renovating it when, in fact, it had already transferred the property to the City of Bryan several months before.

STANDARD OF REVIEW

This court reviews a grant of summary judgement *de novo,* applying the same standards as the district court. Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). All fact questions and reasonable inferences drawn

therefrom are viewed in the light most favorable to the non-moving party. *See Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 205 (5th Cir.1998).

DISCUSSION

I. Mootness

[1][2] Before considering the merits of this appeal, it is necessary to determine whether Mockingbird's foreclosure sale, purchase by HUD, and subsequent transfer to the City of Bryan mooted this appeal. "The mootness doctrine is grounded primarily and originally in the appellate court's inability to fashion relief." *Sullivan Cent. Plaza I, Ltd., v. BancBoston Real Estate Capital Corp. (In re Sullivan Cent. Plaza, I, Ltd.)*, 914 F.2d 731, 733-34 (5th Cir.1990). Ordinarily, an appeal will be moot when the property underlying the dispute has been sold at a foreclosure sale because this court cannot fashion adequate relief, i.e., cannot reverse the transaction. *See id.* at 733 ("If the debtor fails to obtain a stay, and if the property is sold in the interim, the district court will ordinarily be unable to grant any relief."); *United States v. Blanche*, 169 F.3d 956, 957 (5th Cir.1999); *NCNB Texas Nat'l Bank v. Southwold Assocs.*, 909 F.2d 128, 129 (5th Cir.1990).

[3] The foreclosure sale and transfer to the city of Bryan effectively mooted Village's request for an injunction and mandamus because of this court's inability to fashion adequate relief. The property has been sold at a foreclosure sale and is now held by a party not before this court; ***315** the apartment complex has been torn down. Thus, any request for

relief that involves a transfer of "the property" would amount to an impossible request for this court to "unscramble the eggs".

[4][5] Although the injunction and mandamus requests are moot, Village's request for a declaratory judgment continues to present a live dispute because this court can still provide adequate relief. "Where several forms of relief are requested and one of these requests subsequently becomes moot, the Court [can] still consider[ ] the remaining requests." *Powell v. McCormack,* 395 U.S. 486, 496 n. 8, 89 S.Ct. 1944, 1951 n. 8, 23 L.Ed.2d 491 (1969); *see also id.* 395 U.S. at 499, 89 S.Ct. at 1955 ("A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus."). A declaration that HUD violated its regulations and contracts grants Village adequate relief because, even without regaining title to the property, Village could use the declaration as a predicate for a damages action against HUD in the Court of Federal Claims. *See id.* (noting that "[a] declaratory judgment can then be used as a predicate to further relief"); *Globe, Inc. v. United States,* 227 Ct.Cl. 784, 1981 WL 21450 (Ct.Cl.1981) (allowing plaintiff who obtained a favorable declaratory judgment in federal district court to sue the United States for damages in the Court of Claims). The declaratory judgment aspect of this case is not moot.

II. Reviewability

[6] The district court granted summary judgment in

part because it found HUD's actions judicially unreviewable in light of HUD's discretion to approve or deny rent increase requests. Village argues, however, that HUD's actions are reviewable because HUD violated its regulatory and contractual duty to *entertain* the rent increase request.

[7] The Administrative Procedure Act authorizes judicial review of agency decisions except when the "agency action is committed to agency discretion by law." 5 U.S.C.A. § 701(a)(2). An action is committed to agency discretion when "no judicially manageable standards are available for judging how and when an agency should exercise its discretion...." *Heckler v. Chaney,* 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985).

The circuit courts have unanimously agreed that because Congress committed to HUD full discretion in determining whether to grant or deny a rent increase request, the decision on the amount of any increase is unreviewable. *See Frakes v. Pierce,* 700 F.2d 501, 505 (9th Cir.1983) ("[C]ourts are ill-equipped to superintend economic and managerial decisions of the kind involved here.") (quoting *Hahn,* 430 F.2d at 1249); *Langevin v. Chenango Court, Inc.,* 447 F.2d 296, 302-03 (2d Cir.1971); *Hahn,* 430 F.2d at 1249-51. In determining rent increase requests, HUD must delicately balance the competing interests of the property owner, the tenants, and the federal government as guarantor of the loan and payor of the Section 8 subsidy. HUD must also take into account factors that bear on rental rates such as property taxes, utility rates, the

average rental rate in the area, estimates of future maintenance needs, and vacancy rates. *See* 42 U.S.C.A. 1437f (c)(2)(B). Because of the lack of judicially manageable standards and HUD's need for a "flexible exercise of administrative discretion" in overseeing its properties, *Hahn,* 430 F.2d at 1246, courts should generally refuse to review HUD's substantive decisions regarding a rent increase request.

The district court and HUD, however, misconstrue Village's argument. Village is not appealing HUD's denial of its requested rent increase; rather, it is appealing HUD's refusal to entertain the request and the alternative regulatory path taken by HUD--threatening foreclosure and demanding a multimillion-dollar equity contribution from Village. The cases previously cited universally recognize that a ***316** court's refusal to review HUD rent decisions does not necessarily obtain when HUD ignores "a plain statutory duty, exceed[s] its jurisdiction, or commit[s] constitutional error." *Id.* at 1251. As Village's allegations involve these very issues, its claims are reviewable.

III. Village's Request for a Declaratory Judgment

[8] Village seeks a declaratory judgment stating that HUD acted arbitrarily and capriciously by (1) refusing to consider Village's rent increase request; (2) declaring Village in default and subsequently foreclosing on Mockingbird because Village failed to adequately maintain the property; and (3) refusing to review its rent increase request unless

Village escrowed $2 million for repairs on Mockingbird.

Village argues that its obligation to maintain the property was dependent upon HUD's providing sufficient rent revenues to pay for maintenance. According to Village, because HUD refused to approve a sufficient rental schedule, HUD acted arbitrarily and capriciously in citing poor maintenance as the reason for declaring Village in default. HUD counters that Village had an absolute duty to maintain the property, regardless of its rental income. This means that if Village's rental income was insufficient to pay all of its operating and maintenance costs, Village and its financial partners must either invest additional equity to make up any deficiencies or risk default and foreclosure.

HUD's argument would perhaps be convincing if it had undertaken to review Village's rental increase request and to rule upon it. Both the Regulatory Agreement and HUD's regulations require HUD at least to entertain a rent increase request. [FN8] *See* Regulatory Agreement, ¶ 4(g) (stating that HUD "will at any time entertain a written request for [a rent] increase"); 24 C.F.R. § 886.312(b) (stating that once HUD receives a request, it "*shall approve* a rental schedule ... or *shall deny* the increase stating the reasons therefor") (emphasis added). HUD violated its contractual and regulatory duty to consider the rent request. This defect renders suspect HUD's other actions, particularly when the full regulatory context is considered.

FN8. In fact, if Village's mandamus request had not been mooted by the transfer of Mockingbird to the City of Bryan, Village would have been entitled to a mandamus to "require [HUD] to take action upon [the] matter, without directing how it shall act." *Forest Guardians v. Babbitt,* 174 F.3d 1178, 1190 (10th Cir.1999) (quoting Attorney General's Manual on the Administrative Procedure Act, at 108 (1947)); *see also* 5 U.S.C. § 706(1) ("The reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed."); *N.A.A.C.P. v. Secretary of Hous. and Urban Dev.* 817 F.2d 149, 160 (1st Cir.1987).

Village certainly had the duty to maintain Mockingbird "so as to provide decent, safe and sanitary housing." HAP Contract, § 14(a); *see also* Regulatory Agreement, § 7 ("Owners shall maintain the mortgaged premises ... in good repair and condition."). Village's duty, however, was not absolute. Nothing in the National Housing Act, HUD's regulations, the Regulatory Agreement, or the HAP contract requires Village, as a low income property owner, to absorb or subsidize operating and maintenance deficiencies. Instead, the programs are designed to ensure that HUD establishes rental rates so that property owners receive enough revenue to cover all of the property's expenses including maintenance, repairs, debt service, taxes, and a six percent return on investment. *See* 12 U.S.C.A. § 1747c. Thus, the

HUD reimbursement scheme resembles cost-plus contracts or public utility regulation, in either of which situations the private party who performs the work is assured of recovering reasonably incurred costs as well as a reasonable return on investments.

That the cost of operating and maintaining the property, in addition to the cost of complying with the Regulatory Agreement, [***317** FN9] must be paid for out of the regulated rental revenues is reinforced in several ways. First, HUD's internal interpretation of its regulations indicates that operating and maintenance costs are to be derived from the rental revenues. Albert Cason, the Director of Multifamily Housing (Houston, Texas Office) and the HUD official who oversaw Mockingbird, testified that "[e]verything that comes from the project's operation is paid from the rents," and "[w]e've all agreed that the operation and maintenance of the property comes out of the rents." Similarly, HUD's handbook states that "[i]n reviewing requests from owners concerning rents and charges, the Field Office should be guided by the fact that these rents and fees should and must provide sufficient and adequate funding to operate the projects." Multifamily Asset Management and Project Servicing, United States Department of Housing and Urban Development, Handbook 4350.01 Rev-1,7-1 (September 1992); *see also* 42 U.S.C. § 1437f (c)(2)(B) (stating that HUD shall adjust the HAP contract to provide for sufficient monthly rents "to reflect increases in the actual and necessary expenses of owning and maintaining the units"); 12 U.S.C. § 1747c.; *Beck Park,* 695 F.2d

at 371 ("HUD has the duty to maintain reasonable rents, based on operating costs, and to allow project owners a reasonable return on their investment.").

> FN9. Albert Cason, HUD's Houston Director of Multi-Family Housing, testified that rental revenues pay for the costs of complying with the Regulatory Agreement, including 1) the reserve fund for replacements, Regulatory Agreement 2(a); 2) the residual receipts fund, *id.* at 2(c); 3) the cost of producing and submitting the property's annual financial report, *id.* at 9(e); and, 4) the costs of the management contract, *id.* at 9(a).

Second, HUD forced Village to be organized as a single asset entity, which can neither own or operate any other property nor conduct any other business besides owning the property. *See* Regulatory Agreement § 6(f) (prohibiting Village from engaging "in any other business or activity, including the operation of any other rental project"). Because of this requirement, Village had no source of income to maintain the property other than the rental revenues. The only way for it to obtain a sufficient amount of money to pay for the needed repairs was by seeking a rent increase. HUD's refusal to consider a rent increase effectively forced Village either to default or, as HUD well knew, to seek additional equity or debt financing without assurance that these investments would be

recouped.

Third, Village signed a non-recourse note, guaranteed by HUD. From the inception of HUD's program, therefore, Village was not required to support the property financially after its initial investment. Had Village not obtained a non-recourse loan, then either Village as an entity or perhaps its investors could have been made responsible to the lender (and HUD) for failure to repay or comply with terms of the loan. One HUD official put it this way: "[HUD] does not require owners to make outright cash gifts to the projects they own. After final endorsement of a mortgage, there is no requirement of owners to provide additional funds to a project." Letter from Dean K. Reger, Deputy Director of Multifamily Housing Management, to Mr. Streuby L. Drumm, Jr. (October 21, 1994).

The interplay among these aspects of the regulatory program makes clear that all of the expenses of operating and maintaining a low income housing project must be paid out of the rental revenues, which in turn are subsidized by HUD. The regulatory scheme does not contemplate that property owners must bear the risk of maintaining properties based on insufficient rental revenues. HUD could understandably refuse to provide financial assistance to an owner that has misappropriated funds, mismanaged the property, taken a profit instead of maintaining the property, or been negligent in its management in some other regard. When those elements are absent, however,

the ***318** statutes provide that HUD must ensure that the owner receives rents sufficient to meet at least the operating and maintenance expenses of the property. There is no statutory or regulatory basis for imposing on a conscientious low-income housing operator the risk of uncompensated dilapidation or deterioration; the federal government, not the private contractor, is charged with funding the public program.

In the case at hand, it is alleged that rental revenues approved by HUD were consistently insufficient to cover the cost of operating and maintaining the property. [FN10] Village sought several rental increases over the course of its ownership of Mockingbird, but it never received the full amount requested, nor the amount it thought was necessary to maintain the property. [FN11] Annual financial audits appear to have routinely showed, moreover, that Village never misappropriated funds or squandered its revenues. Village never received a profit from Mockingbird and appears to have applied all of its revenues to cover costs of operating and maintaining the property. In addition, there was no evidence that the property was mismanaged, [FN12] nor did HUD ever attempt to remove the management company as it had a right to do. *See* Regulatory Agreement, 9(a) ("Any management contract entered into by Owners ... involving the project shall contain a provision that it shall be subject to termination, without penalty, and with or without cause, upon written request by the Commissioner addressed to the Owners.").

FN10. In January 1988, a HUD inspection indicated that the HUD- approved rent schedule was insufficient to satisfy Mockingbird's needs. *See* Management Review Questionnaire, January 27, 1988. Seven years later, (and one month before Village requested the rent increase request involved in this case), a HUD Management Review Report also stated that the HUD-approved rent schedule was insufficient to meet Mockingbird's needs. *See* Management Review Summary Sheet, May 3, 1995.

FN11. In 1990, Village requested a 15% rent increase, but HUD approved a 10.4% increase. In 1993, Village requested an 18% increase, but HUD approved only a 12% increase. In 1994, Village requested a 15% increase, but HUD granted only a 7% increase. The last time Village requested a rent increase, in 1995, Village requested a 29% increase, but HUD refused to consider the request unless Village first escrowed $2 million.

FN12. Although HUD now accuses Village of poorly maintaining Mockingbird, there is a dearth of evidence to support its claim. At most, the record reflects a concern by HUD that Mockingbird's maintenance staff

was inexperienced. The record does not evince, however, the sort of wide- spread mismanagement suggested by HUD. In fact, the record reveals the opposite. For instance, in a letter written to Village less than two weeks before HUD became a mortgagee in possession, HUD conceded that it "has no current problems with the performance of the Management Company because it was presumed the company was not properly funded to effect appropriate repairs." Letter from Albert Cason, *HUD Director of Multi- Family Housing,* to Dean Earle Ross, *General Partner, Christopher Village Limited Partnership* (November 20, 1995); *see also* Deposition of Albert Cason, 286 (October 24, 1996) (testifying that the cause of Mockingbird's decline was not the management, but the lack of money to repair the property); HUD Management Review, Part A, A-1 (May 3, 1995) (finding that, although Mockingbird is in poor condition, "on-site management appears to be earnestly trying to make corrections with the funds and training allocated").

These facts reinforce Village's contention that HUD's $2 million demand was arbitrary and capricious. As noted *supra,* instead of considering Village's rent request, HUD determined that "no action" would be taken unless Village first escrowed $2 million. HUD cannot point to any statute, regulation, or agreement with Village giving

it the discretion to table Village's rent increase request and use it as leverage to demand $2 million new equity for repairs. [FN13]

> FN13. Furthermore, HUD's motive in refusing to consider Village's rent request was suspect. Internal HUD e-mail showed that, for several months prior to declaring Village in default, HUD officials planned to force Mockingbird into default and thus obtain the property. Responding to one suggested course of action, one HUD official stated:
> I don't think these are the same courses of action, but are parallel. They'll attempt possession through a deed in lieu; conduct the inspection and notice the owner in case they need a regulatory default and begin foreclosure as soon [as] the loan is assigned (if it[']s not). Whichever action is completed first will have accomplished the desired goal: possession of the property, the quickest way possible.
> E-Mail from Albert B. Sullivan to Kenneth F. Hannon et al. (April 24, 1995).

***319** Because HUD acted without statutory or regulatory authority, the agency arbitrarily and capriciously demanded Village to escrow $2 million before it would consider the rent request.

HUD argues that a holding in Village's favor would

mean that HUD has the duty to pay for all of a property's maintenance expenses, thus giving owners the incentive to neglect the maintenance needs of their property. We disagree. This decision has no bearing on those cases where a property owner has negligently permitted the property to deteriorate or has misused its rental income in a way that has caused the maintenance problem. As noted *supra,* rental increase decisions are discretionary and are generally unreviewable by the courts. In this case, however, HUD acted arbitrarily and capriciously when it refused to abide by its legal obligation to consider a rental increase request from a non-negligent owner and instead demanded a $2 million cash infusion and then declared the property in default for those very reasons.

IV. Due Process Violation

[9] Village also argues that HUD officials violated due process by abating a single Section 8 subsidy payment. In May 1995, a HUD inspection of Mockingbird revealed that 173 out of 200 units failed HUD's Housing Quality Standard ("HSQ") review. Consequently, HUD gave Mockingbird 30 days to repair the units or face abatement of its Section 8 subsidies. A follow-up inspection revealed that all but 19 of the units were repaired; thus, HUD abated its subsidy accordingly. The abatement, which totaled $ 7,594, lasted only one month (August 1995) as the remaining 19 units later passed inspection. According to Village, HUD officials falsified the inspection reports that formed

the basis of HUD's decision to abate. In addition, Village claims that "[n]one of the cited deficiencies justified abating the Section 8 payments."

The HAP contract gives HUD complete discretion regarding decisions to reduce Village's Section 8 subsidy. *See* Housing Assistance Payments Contract, § 26(b)(2)(b) (stating that HUD may "[r]educe or suspend housing assistance payments until the default under this Contract has been cured to the satisfaction of HUD"). As with decisions whether to grant or deny rent increase requests, *see supra,* HUD's exercise of discretion with respect to HUD's abatement decision is unreviewable. [FN14] The district court correctly granted summary judgment for HUD on this issue.

> FN14. The documents that Village proffers as proof of falsified reports are immaterial. HUD could not have possibly relied upon these documents in deciding to abate the August payment because all of the documents pre-date HUD's June 15, 1995, re-inspection that formed the basis of the abatement.

CONCLUSION

Village's request for an injunction and mandamus is now moot because Mockingbird was sold at a foreclosure sale, transferred to the City of Bryan, and razed. Village's declaratory judgment request,

however, still presents a live controversy. Because we find that HUD acted arbitrarily and capriciously in declaring Village in default after it demanded that Village pay $2 million before considering Village's rent increase request, we reverse the district court's grant of summary judgment. Upon remand, the district court should issue Village's requested declaratory judgment consistent with this opinion.

***320** Appeal DISMISSED AS MOOT in part, AFFIRMED in part, and REVERSED in part.

LAW OFFICES OF E. GREY LEWIS
1825 I ST., N.W.,
SUITE 400
WASHINGTON, D.C. 20006
(202) 429-2082

March 20, 1999

Charles R. Fulbruge III
Clerk of the Court
United States Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Dear Mr. Fulbruge:

The Court has raised the issue of whether this case is moot, in light of the following: The United States Department of Housing and Urban Development ("HUD") bid in Mockingbird Run at the foreclosure sale on May 28, 1998; Appellants did not seek money damages; and, Appellants' motion to stay the foreclosure pending appeal was denied. For the following reasons, this case is not moot.

In their Complaint, Appellants (then Plaintiffs) alleged that HUD had illegally declared them in default on the mortgage on Mockingbird Run and had initiated, and would continue, an illegal foreclosure action. The Complaint further

alleged, that in so doing, HUD had breached its contracts with Appellants, violated the National Housing Act, 12 U.S.C. §§ 1701, et seq., and violated its own regulations. Appellants sought injunctive and declaratory relief from these illegal actions by HUD. Complaint ¶¶ 65-75.

The declaratory judgment Appellants sought in their Complaint will provide Appellants relief. To the extent that the declaratory judgment, standing alone, does not provide complete relief, Appellants have also sought, "[f]urther necessary or proper relief, as the Court may deem just and proper." Complaint ¶ 75. This tracks section 2202 of the Judicial Code, which allows a court to give, "[f]urther necessary or proper relief based on a declaratory judgment . . ." 28 U.S.C. § 2202. See *Martin v. Helstad*, 699 F.2d 387, 388 n.2 (7th Cir. 1983).

"For a wrongful foreclosure the borrower has alternative and inconsistent remedies. He may let the wrongful foreclosure stand and ask for damages . . ." HUD agrees with this. Appellee's Opposition at 4. [He may also] ask to have the wrongful foreclosure set aside and the situation restored which existed prior to the foreclosure . . ." National Life Insurance Company v. Silverman, 454 F.2d 899, 905, 906 (D.C. Cir 1971) (en banc).

Money damages are available in the United States Court of Federal Claims under the Tucker Act. 28 U.S.C. § 1491. Equitable relief is available from this Court.

An action for breach of contract must be brought in the Court of Federal Claims; however,

even if that were the only coercive relief available this case would not be moot. This was precisely the issue presented to the Court in Duke Power v. Environmental Study Group, 438 U.S. 59 (1978). Plaintiffs had brought an action in United States District Court for a declaratory judgment that the Price-Anderson Act (limiting the liability of nuclear facilities) would take their property without affording any compensation. The Court held that even though a taking case could only be brought in the United States Court of Claims, the District Court had jurisdiction under 28 U.S.C. § 1331 to decide this case. The test is not whether the plaintiff will actually be able to recover any damages. Rather, the test is whether plaintiffs' claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." Duke Power v. Environmental Study Group, 438 U.S. 59, 70-71 (1978). (internal quotation marks omitted). The only court that could give the Plaintiffs money damages was the Court of Claims. However, the District Court had jurisdiction to issue a declaratory judgment, whether or not further relief is or could be granted.

In Powell v. McCormack, 395 U.S. 486 (1969), defendants had argued that the case should be dismissed because no court, including the Supreme Court, could compel action by a member of Congress. The Court held that:

> The availability of declaratory relief depends on whether there is a live dispute between the parties . . . and a request for declaratory relief may be

> considered independently of whether other forms of relief are appropriate. (internal citations omitted)

Powell v. McCormack, 395 U.S. at 517-18.

Here, a declaratory judgment may provide the basis for a later suit for money damages in the United States Court of Federal Claims. Charter Federal Savings Bank v. FDIC, 976 F.2d 203, 210 (4th Cir. 1992), cert. denied 507 U.S. 1004 (1993). It could also be the basis for this Court's further exercise of its equitable powers in "unwinding" the conveyance of Mockingbird Run to HUD.

The Court is free to "unwind" any transactions between the parties that are before it, where, as here, the transaction is not complex and no third party's rights have intervened. Baker & Drake v. Public Service Commission of Nevada, 35 F.3d 1348 (9th Cir 1994).

The case to which the Court referred, In re Sullivan Central Plaza, I, Ltd., 914 F.2d 731 (5th Cir. 1990), is readily distinguishable. There, property was sold at foreclosure and the debtor appealed. The Court held that under Texas law there was no statutory right of redemption and, on rehearing that there was no relief available under the Bankruptcy Act. See In re Sullivan Central Plaza, I, Ltd., 935 F.2d 723 (5th Cir 1991).

As the Court noted in Sullivan, wrongful foreclosures are distinguishable from those that occur in the course of a bankruptcy proceeding. "Wrongful foreclosures may be reversible." Sullivan, 914 F.2d at 734. Here, Appellants are not relying on a statutory right of redemption or the

Bankruptcy Act. HUD has violated its organic statutes, its own regulations, and has breached several contracts and, as a result, has wrongfully foreclosed. Appellants are relying on a declaratory judgment and, as necessary, further relief under 28 U.S.C. § 2202. Alternatively, Appellants could sue the United States in the Court of Federal Claims. As the Ninth Circuit has held:

> In the instant case, Laguna has requested a declaration that it possesses contract rights against the United States. It has not sought money damages for breach of those rights, nor has it sought specific performance. A district court does not lose jurisdiction over a claim for non-monetary relief simply because it may later be the basis for a money judgment.

Laguna Hermosa Corporation v. Martin, 643 F.2d 1376, 1379 (9th Cir. 1981)

Neither this Court's power to grant further equitable relief, nor the Court of Federal Claims' power to entertain a claim for money damages depends on a statutory right of redemption, under state law or otherwise. Such was not the case in Sullivan, or in any other bankruptcy proceeding:

> [T]he [property] rights of parties to a bankruptcy proceeding are created and defined by state law. . .. Absent a state law that would allow this Court to set aside the foreclosure sale, we are without power to create a remedy under "equitable principles." (internal citations and quotation marks omitted)

In Re: Egbert Development, LLC v. Community First National Bank, 219 B.R. 903, 906-907 (Bankruptcy Panel 10th Cir. 1998).

In addition, Wilshire is not only the general partner of the owner of Mockingbird Run, but also, the general partner of other limited partnerships that own low-income housing. Every one of these owners is subject to the same extortion committed by HUD in taking Mockingbird Run. This case will determine the fate of Mockingbird Run, the other limited partnerships in which Wilshire is the general partner, and the more than a million units of low-income housing owned by private industry.

No Court will ever be in a better position to review and set aside HUD's illegal actions, than this Court. If this Court does not decide this case, Wilshire and all other property owners in the Nation will be powerless against HUD. HUD will have carte blanche to engage in the fraud, deception, and extortion that permeate this case.

A property owner has no obligation to invest any capital beyond the initial equity paid at closing. HUD forbids property owners from having any other business, interests, or investments. Record, Document 1 at p. 26. If HUD does not process justified rent increase requests and demands that the owner invest additional money, the owner is presented with a dilemma: accede to HUD's illegal demand to keep HUD from foreclosing; or, let HUD foreclose and pay even more than HUD demands in taxes.

If HUD forecloses, the non-recourse portion of the debt is part of the amount realized from the sale of an asset and is taxable. Commissioner v.

Tufts, 461 U.S. 300 (1983). Furthermore, if the owner was able to reap any of the tax benefits of owning low-income housing, before they were eliminated in 1986, some or all of that gain may be treated as ordinary income.

In this case, HUD foreclosed and the limited partners paid a tax bill in cash to the I.R.S. totalling $2.2 million. There will be state tax liability as well.

Lawsuits are expensive and time-consuming. The problem is exacerbated by HUD's ill-timed change of attitude towards the private investor. Twenty to 30 years ago, when HUD was courting private investors, many of the Owner's limited partners were young or middle-aged investors. Now, many of the limited partners are older and retired.

HUD has done this many times. It knows that many property owners will pay the amount HUD demands -- extortion or not. The possible gain to HUD is well worth the risk of the claim against HUD's insurance fund that would result from foreclosure. Moreover, the amount that HUD has been able to pocket by not paying adequate rents offsets any "loss" to the insurance fund.

HUD has committed fraud and has acted in bad faith at every available opportunity. Most recently, in its opposition to Appellants' Motion for a Stay, the Government stated that 18,000 people have requested copies of the prospectus and that "bidders from around the country [sic] will incur significant costs to attend the sale." See, Exhibit 1, Appellees [sic] Opposition to Motion for Emergency Stay Pending Appeal, at 4. This was based on the affidavit of E. Ross Burton, a senior

official with HUD. See Exhibit 1, ¶ 10, Appellees [sic] Opposition to Motion for Emergency Stay Pending Appeal.

HUD made the sale of the property subject to the full rigor of Section 8, but with none of the benefits. The notice of default and foreclosure sale, signed by the Commissioner, was clear: "HUD will not provide Section 8 funds with the sale of this property." HUD, Appellants, and the Commissioner all knew that only HUD would attend the sale and that only HUD would bid. This has occurred many times before at many sales across the Country.

As Appellants had predicted in their motion for stay, no one attended the sale and there were no bids other than HUD's. At the sale, HUD bid in the Property. There was a substantial deficiency on which Appellants' limited partners paid tax. HUD not only lied to this Court, but also, "chilled the sale."

But for sovereign immunity, this would be a classic Section 1962(c) RICO case with "open-ended continuity." See 18 U.S.C. § 1962(c), 1951(a)(Hobbs Act) (conducting the affairs of an enterprise through a pattern of extortion). Fifth Circuit, Pattern Jury Instructions, Civil Cases, § 8.1; Criminal Cases, §§ 2.73, 2.74. HUD's actions are continuing. HUD's actions have the same modus operandi, victims, and motive.

The only effective relief for Wilshire --aside from Mockingbird Run -- is that available in this case from this Court. HUD can foreclose faster than a property owner can litigate. One would hope that a declaratory judgment telling a department of

government that certain conduct is illegal would have some deterrent effect.

The issues raised in this case are capable of repetition, yet evading review. See Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911). HUD's action is too short in duration to be fully litigated. Wilshire will be subject to the same action again. Also, there is still a case or controversy as to Mockingbird Run.

Accordingly, this case is not moot. Appellants respectfully urge this Honorable Court to proceed to a decision on the merits.

Respectfully submitted,

E. Grey Lewis,
Attorney for
Appellants

cc.: Lowell V. Sturgill, Jr.

LAW OFFICES OF E. GREY LEWIS
1825 I ST., N.W.,
SUITE 400
WASHINGTON, D.C. 20006
(202) 429-2082

June 4, 1999

Charles R. Fulbruge III
Clerk of the Court
United States Court of Appeals for the Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Re: *Christopher Village Limited Partnership, Inc. v. Cisneros*, No. 98-20181

Dear Mr. Fulbruge:

This case was argued on January 6, 1999, before a panel consisting of Fifth Circuit Judges Jones, Smith, and Garza. Appellees have filed a letter dated May 27, 1999 indicating that Mockingbird Run will be demolished in a few days. This is Appellants' response to that letter. If Appellants' Motion for Leave to File this response is granted, Appellants request that you distribute copies of this letter to the panel in this case as soon as possible.

In its letter dated May 27, 1999, Appellees claim that "HUD has recently become aware that the City of Bryan, Texas plans to demolish [Mockingbird Run] some time in early June 1999." In August 1998, when HUD agreed to transfer legal title in Mockingbird Run to the City of Bryan for

$10.00, HUD also agreed to execute an "Upfront Grant Agreement." This side agreement is contained in Rider 5 to the "contract of sale" and signed specifically on behalf of the HUD Secretary. Rider 5 makes clear that the Grant is "given for the purpose of demolition." For Appellees now to claim that HUD has "just become aware" of the City's plans to demolish Mockingbird Run within the next several days strains credulity

Moreover, HUD still has an ownership interest in Mockingbird Run. The "sale" to the City of Bryant is a fiction, apparently devised to fool the Court in this case.

Appellees refer to the property transfer as a sale, in an attempt to provide a veneer of bona fides. The nominal consideration of $10.00 belies the notion that this is a sale. A nominal purchase price is not necessarily fraudulent. However, the elaborate subterfuge created by HUD to mask the true nature of its interest in Mockingbird Run is fraudulent.

The "Equity Participation" scheme to which the City of Bryan agreed as part of the "contract of sale," and described in Rider 4 to the "contract of sale" is also signed specifically on behalf of the HUD Secretary. It demonstrates unequivocally the real nature of the transaction: (1) HUD "sold" the Property to the City of Bryan for $10.00; (2) HUD gave the City of Bryan a grant to demolish the Mockingbird Run Apartment complex; (3) The City of Bryan agrees that if it sells the property within the next 15 years it will give all of the proceeds of the sale back to HUD, less reasonable expenses as approved by HUD. If the property is sold more

than 15 years later, HUD is paid between 25 and 75 percent of the proceeds of sale.

HUD also gets paid if the property is refinanced without HUD's approval. The City must pay HUD all of the proceeds from the refinancing, less expenses and any refinancing proceeds previously paid to HUD by the City under this agreement.

The City is required to maintain accurate records of any sale or refinancing. HUD is entitled to examine these records and to require an audit.

This transaction is akin to a money laundering scheme. It is, if you will, a "property laundering" scheme. For Appellees to claim that HUD no longer has any interest in Mockingbird Run is a misrepresentation. If the property is sold – after the HUD financed demolition -- HUD stands to receive all of the proceeds of sale, unless, at its option, HUD cuts a deal with the City for a certain percentage.

This case continues to be a dramatic demonstration of HUD's *modus operandi*. HUD's cupidity and fraudulent intent are only exceeded by its brashness: HUD has conducted business as usual even when its transactions are being scrutinized by a United States Court of Appeals.

Instead of performing its ministerial duty and considering the Owner's rent increase request, HUD attempted to extort $2 million from the Owner's limited partners. When the limited partners did not pay the $2 million demanded, HUD carried out its threat. HUD declared a default, and took their property. As HUD had threatened, the limited

partners were presented with a $2.2 million tax bill, payable in cash to the IRS.

Once in this Court, Appellees have repeatedly misrepresented the status of the Property.

Misrepresentation No. 1. Appellees have represented to this Court that potential bidders were expected from all over the Country for the sale of Mockingbird Run. Appellees knew better. Mockingbird Run was sold subject to all of the penalties and none of the benefits of the Section 8 program. 42 U.S.C. § 1437f. Appellees knew that the only bidder would be HUD.

Misrepresentation No. 2 . Last January during oral argument, Appellees represented in open Court that HUD had recently invested $4-5 million dollars in rehabilitating Mockingbird Run for occupancy by needy residents. Of course, by that time the sham conveyance to the City of Bryan had already taken place. Either, HUD had not paid the money or it had frivolously invested $4-5 million of the taxpayers' money in property it planned to demolish a few months later.

Misrepresentation No. 3. Mockingbird Run has been sold to the City of Bryan. In fact, HUD still possesses an ownership interest in Mockingbird Run. HUD will get all of the proceeds of sale – less expenses – if the property is sold within the next 15 years.

Misrepresentation No. 4. HUD has just learned of the pending demolition of Mockingbird Run. In fact, HUD gave the City of Bryan a grant to demolish Mockingbird Run.

Misrepresentation No. 5. Appellees claimed they needed to act quickly and sell Mockingbird

Run in order to avoid needless expenses. If HUD had wanted to save money, it would simply have obeyed the law and processed the Owner's rent increase request when it was submitted. If justified, the request would have been granted. Instead HUD has: unlawfully failed to process the rent increase request; spent money from the insurance fund; paid to relocate the tenants – whose welfare HUD has consistently ignored; and, paid to have Mockingbird Run Apartments demolished.

HUD has eschewed its Inspector General's ("I.G.") repeated admonition that the rent schedule must be sufficient to maintain and repair the project. In several instances, the HUD State Office was spared adverse audit findings by the HUD I.G. only because it had recently taken action that "enabled the auditee to request and [the HUD Office] to quickly approve a substantial rent increase to address the repair problem." Audit Related Memorandum, 96-BO-212-1802, October 17, 1995, at 1. **Doc. 41, p. 18.** Audit Related Memorandum, 96-BO-214-1001, October 26, 1995, at 1. **Doc. 47, p. 38**.

Here, HUD had the money available in the required HAP Contract reserve fund for an ample rent increase and the Owner had offered to advance $500,000.00 for repairs. It is impossible for HUD to reconcile its refusal then to consider a rent increase and refusal to accept the $500,000.00 with its newly discovered zeal for conserving the taxpayer's money and complying with the statutory requirement that it "pursue the least costly alternative." 12 U.S.C. § 4112(a); 42 U.S.C. § 1485(t).

Despite HUD's best efforts to render this case moot, this is still very much a live controversy that needs to be resolved by this Court. Here, the Owner has a vital interest in a declaratory judgment declaring HUD's actions illegal. Moreover, HUD can default, foreclose, create a sham sale and sell-back, and demolish a project before any owner can litigate a case to conclusion.

There are over 3 million Section 8 apartment units in this Country. This is more than twice the number of public housing units (about 1.7 million). Many owners of Section 8 properties have already been subjected to extortion by HUD. As of this moment, whether the remaining owners will be subject to the same extortion is entirely HUD's decision. As shown in this case, HUD's wrongful conduct is capable of repetition but is intended by HUD to escape judicial review.

Respectfully submitted,

E. Grey Lewis
Attorney for Appellants

CC.: Lowell Sturgill, Esq.

United States Court of Federal Claims.

CHRISTOPHER VILLAGE, LP, and Wilshire Investments, Corp., Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 99-775C.

Oct. 26, 2001.

Owners of low-income apartment building brought suit alleging that the actions taken by the United States Department of Housing and Urban Development (HUD) in foreclosing upon the building constituted a breach of plaintiffs' contracts with HUD. On plaintiffs' motion for class certification, the Court of Federal Claims, Firestone, J., held that proposed class of low-income property owners were forced to default or seek additional equity or debt financing because the Department of Housing and Urban Development (HUD) enforced obligation to repair the property did not satisfy requirements for class certification as set forth in procedural rule and Quinault.

Motion denied.

West Headnotes

[1] Federal Courts 1110
170Bk1110 Most Cited Cases

Under the Quinault test for class certification in the Court of Federal Claims, a plaintiff must

demonstrate that: (1) the class is large but manageable; (2) there is a question of law common to the whole class; (3) the common question of law predominates over individual questions of fact; (4) plaintiff's claim is typical of those claimed by class members; (5) the government's action is generally applicable to the class; (6) the claims of the class members are too small to be pursued individually; (7) the plaintiff will adequately represent the class; and (8) individual actions would create the risk of varying adjudications. RCFC, Rule 23, 28 U.S.C.A.

[2] Federal Courts 1110
170Bk1110 Most Cited Cases

Class action suits in the Court of Federal Claims are generally disfavored. RCFC, Rule 23, 28 U.S.C.A.

[3] Federal Courts 1110
170Bk1110 Most Cited Cases

Proposed class of low-income property owners who were forced to default or seek additional equity or debt financing because the Department of Housing and Urban Development (HUD) enforced contractual obligation to repair the property did not satisfy third Quinault requirement for certification that a common legal question predominate over separate factual issues; substantial factual differences with regard to both entitlement to and amount of damages overshadowed any common legal issues that existed. RCFC, Rule 23, 28 U.S.C.A.

[4] Federal Courts 1110
170Bk1110 Most Cited Cases

Proposed class of low-income property owners who were forced to default or seek additional equity or debt financing because the Department of Housing and Urban Development (HUD) enforced contractual obligation to repair the property did not satisfy fourth Quinault requirement for certification that their claims be typical of those of the proposed class; because of prior litigation by named plaintiffs, they would not be required to litigate certain issues that other members of putative class would be required to litigate. RCFC, Rule 23, 28 U.S.C.A.

[5] Federal Courts 1110
170Bk1110 Most Cited Cases

Proposed class of low-income property owners who were forced to default or seek additional equity or debt financing because the Department of Housing and Urban Development (HUD) enforced contractual obligation to repair the property did not satisfy fourth Quinault requirement for certification that the claim of each putative class member was too small to be pursued individually, notwithstanding named plaintiffs' contention that they would represent thousands of individual limited partners with claims of between $5,000 and $10,000. RCFC, Rule 23, 28 U.S.C.A.

[6] Federal Courts 1110
170Bk1110 Most Cited Cases

[6] Federal Courts 1141
170Bk1141 Most Cited Cases

Proposed class of low-income property owners who were forced to default or seek additional equity or

debt financing because the Department of Housing and Urban Development (HUD) enforced contractual obligation to repair the property did not satisfy fourth Quinault requirement for certification pertaining to risk of inconsistent adjudication; there was no such risk because breach of contract claims asserted by named plaintiffs could only be heard in the Court of Federal Claims and reviewed by the Federal Circuit. RCFC, Rule 23, 28 U.S.C.A.

*636 E. Grey Lewis, Washington, DC, for plaintiff. Ernest C. Baynard, III, of counsel.

Steven J. Gillingham, Washington, DC, with whom were Robert D. McCallum, Jr., Assistant Attorney General and Director David M. Cohen, for defendant. Nancy Christopher and Geoffrey L. Patton, U.S. Department of Housing Urban Development, of counsel.

ORDER DENYING CLASS CERTIFICATION

FIRESTONE, Judge.

This action is brought by plaintiffs Christopher Village, Limited Partnership ("Christopher Village") and Wilshire Investments Corporation, the general partner (hereinafter referred to jointly as plaintiffs). The plaintiffs are seeking damages in connection with the government's actions in foreclosing upon plaintiffs' low-income housing apartment building, called Mockingbird Run Apartments, in Bryan, Texas. The complaint alleges that the actions taken by the United States Department of Housing and Urban Development ("HUD") in this foreclosure constitute a breach of plaintiffs' contracts with HUD. Plaintiffs' current

motion, which the government opposes, is to certify a class *637 pursuant to Rule 23 of the Rules of the United States Court of Federal Claims ("RCFC 23"). The plaintiffs' putative class is made up of all allegedly similarly-situated low-income housing owners. As discussed below, the court finds that plaintiffs do not meet the criteria for class certification and therefore denies plaintiffs' motion for class certification under RCFC 23.

BACKGROUND FACTS

The facts in this case are best understood after a brief summary of the statutory and regulatory backdrop. For more than twenty years, Christopher Village owned the Mockingbird Run Apartments, a low-income housing complex with mortgages guaranteed by HUD under the National Housing Act of 1934, 12 U.S.C. § 1701 et seq. (2001). Under § 221(d)(3) of this Act ("Section 221"), HUD is authorized to insure loans made by private developers and others for the purpose of building and maintaining multifamily housing facilities for low and moderate income tenants. See id. § 1715(d)(3). The owners of Section 221 properties are allowed to sign non-recourse notes and are entitled to certain tax benefits, including accelerated depreciation. See 26 U.S.C. § 168(b)(4) (1998 & Supp.2001). In return for these benefits, owners must enter into a "Regulatory Agreement" with HUD. These Regulatory Agreements give HUD extensive authority over the operation and maintenance of the subject properties. Among the obligations established under the Regulatory Agreement, is the requirement that owners maintain the project in good condition. Section 7 of the Regulatory Agreement provides that owners must

"maintain the mortgaged premises, accommodation, and the grounds and equipment appurtenant thereto, in good repair and condition."

In addition to these Regulatory Agreements, HUD also has statutory authority to enter into Housing Assistance Payment ("HAP") contracts pursuant to section 8 of the National Housing Act of 1937, 42 U.S.C. § 1437 ("Section 8"). Section 8 allows HUD to provide rental assistance to residents of non-government owned multi-family housing projects. 42 U.S.C. § 1437f. Under Section 8, HUD provides housing assistance payments directly to the owner. Many of the provisions of these HAP contracts are mandated by statute and regulation, including the requirement that owners maintain the project in good repair: section 14a of the HAP contract requires the owner to agree "to maintain and operate the contract units and related facilities so as to provide decent, safe and sanitary housing as defined by HUD." See 24 C.F.R. § 886.123(a) (1995).

The Regulatory Agreements and HAP contracts also address HUD's obligations with regard to setting rents for the subject properties. Pursuant to the Regulatory Agreements, HUD must approve project rents. Once rents are set, HUD must also approve any rent increase. Among the issues HUD must consider in evaluating a proposed rent increase are: "the project's operating costs and debt service (as calculated by HUD), and the owner's return on investment, with adjustments for vacancies, the project's non-rental income, and other factors HUD deems to be appropriate." 24 C.F.R. § 886.112(b). With respect to properly-supported requests for rent increases, pursuant to the Regulatory Agreement,

HUD is required to: "Approve [those increases] that are necessary to compensate for any net increase occurring since the last approved rental schedule, in taxes ... and operating and maintenance expenses over which Owners have no effective control, or Deny the increase stating the reasons therefor." Regulatory Agreement § 4(g).

The present case arises out of the Regulatory Agreement and HAP contracts entered into between HUD and Christopher Village. In 1995, HUD decided to take action against Christopher Village based on HUD's conclusion that the Mockingbird Run Apartments had become severely run down. By 1995, HUD estimated that the cost of necessary maintenance repairs at the Mockingbird Run Apartments exceeded $1 million. As a consequence, HUD placed the project on its list of the nation's most troubled low income housing properties. This consequently subjected the Mockingbird Run Apartments and its managers to certain enforcement actions prescribed by a HUD enforcement program aimed at identifying and improving the physical *638 and financial conditions of HUD's troubled subsidized properties. [FN1]

FN1. Plaintiffs have provided the court with certain background information regarding HUD's increased focus on enforcement as a means of placing responsibility for maintenance on the shoulders of the owners, including the transcript of an American Bar Association ("ABA") Workshop on HUD Enforcement held on May 29, 1997. At the workshop, various HUD officials explained

their intention to strictly enforce the maintenance requirements set forth in HUD's Regulatory Agreements and Section 8 contracts.

Under the HUD enforcement program, HUD assembled "Special Workout Assistance Teams" or "SWAT" teams to identify and correct maintenance problems at the subject properties. [FN2] Nicolas R. Retsinas, Assistant Secretary for Housing during the mid-1990's, explained the role of the SWAT teams in testimony before the United States House of Representatives, Committee on Government Operations Subcommittee on Employment, Housing and Aviation, as follows: "The SWAT approach provides a concentrated focus of skills and enforcement to prevent the failure of projects ... and to mitigate losses to the government." Addendum to Testimony of Nicolas P. Retsinas, Oct. 6, 1994. According to Vyllorya A. Evans, the Director of HUD's SWAT program from 1995 to 1998, over the life of the SWAT program, fifty HUD managers reviewed and evaluated the maintenance status of approximately 400 of HUD's 30,000 low-income housing projects. Ms. Evans explains in her affidavit that the projects identified for SWAT attention "were properties which failed to be maintained in good repair, but could also include projects with financial deficiencies, high vacancies, management deficiencies and diversions of project income." [FN3]

FN2. In 1998 HUD established a Departmental Enforcement Center which assumed responsibility for bringing owners

into compliance with their HUD agreements. The SWAT teams were part of this enforcement program. See Affidavit of Vyllorya A. Evans, Deputy Director of the Office of Housing Assistance and Grant Administration of HUD, at 2.

FN3. There were apparently many reasons that HUD-subsidized properties fell into disrepair, including significant changes in the demographics of assisted housing. Assistant Secretary Retsinas testified before Congress: "We must also change the demographics of assisted housing. In the 1980's, when projects ran into financial trouble, HUD provided additional Section 8 assistance. What seemed like a good way to prevent defaults had an unintended side effect.... The higher-income residents, the working poor, left these projects, and the concentration of tenants on public assistance increased.... As with public housing, the good intentions of the past have resulted in concentrating the least able, the poorest, and the disheartened." Retsinas, Oct. 6, 1994 testimony.
Sherry Pugh, a manager of the Mockingbird Run Apartments who worked for Bynam Properties, explained some of the challenges the project managers faced in an April 11, 1995 memorandum following a HUD inspection. She explained that having 100 percent Section 8 tenants at Mockingbird Run Apartments took a physical toll on the property.

The actions taken by the SWAT team that evaluated the Mockingbird Run Apartments have already been the subject of litigation between plaintiffs and HUD. See Christopher Village, LP v. Retsinas, 190 F.3d 310 (5th Cir.1999). The key facts in that litigation are set forth in the Fifth Circuit's decision and may be summarized as follows. Following an initial inspection of the property in April 1995, HUD informed plaintiffs that their failure to refurbish the property could result in their loss of Section 8 rent subsidies and could lead to a default under their Regulatory Agreement. HUD took the position that under the Section 8 contract and Regulatory Agreement, Christopher Village had an absolute or unconditional obligation to maintain the project. In June 1995, plaintiffs asked HUD for a rent increase in order to meet HUD's demands for refurbishing the project. Christopher Village also submitted a proposed plan to address the problems at Mockingbird Run. [FN4] Without acting on the rent increase request, HUD sent a letter to plaintiffs on August 25, 1995, reiterating its contention that Christopher Village had a contractual obligation to maintain the premises and demanding that plaintiffs place $2 million in escrow to pay for the necessary repairs. On September 6, 1995, HUD sent a second *639 letter stating that it would not act on plaintiffs' requested rent increase until plaintiffs agreed to comply with the August 25 letter. When plaintiffs failed to place the $2 million cash infusion in escrow, on September 14 HUD notified plaintiffs that they were in default of their Regulatory Agreement. As a result, the federally-insured mortgage was assigned to HUD, which took possession of the property in foreclosure.

FN4. Christopher Village offered to make a $500,000 capital contribution to resolve the repair issues, but the offer was made as part of an overall package that included a substantial rent increase and additional contributions from HUD. HUD rejected the offer.

The plaintiffs in the present action filed their original suit against HUD officials in the United States District Court for the Southern District of Texas following HUD's decision to foreclose on the property. In that lawsuit, plaintiffs sought to set aside HUD's actions on the grounds that HUD's failure to consider plaintiffs' rent increase request was unlawful, the demand for $2 million was illegal, and that without sufficient rental revenue it was not possible for plaintiffs to maintain the property. Settlement efforts failed when HUD refused Christopher Village's offer to fund the repairs through a rent increase. Subsequently, the district court denied plaintiffs' requested relief and granted summary judgment for HUD. The district court held that under Christopher Village's agreements with HUD, Christopher Village had an absolute obligation to maintain the property, without regard to HUD's approval of any rent increases. Plaintiffs' request for a stay pending appeal was denied by both the district court and court of appeals, and HUD slated the property for sale. HUD subsequently sold Mockingbird Run Apartments to the City of Bryan for $10.00.

On appeal, the Fifth Circuit found that several of

plaintiffs' claims were moot, but concluded that Christopher Village's claim for declaratory relief remained. Specifically, the Fifth Circuit noted that a "declaration that HUD violated its regulations and contracts grants [plaintiffs] adequate relief because, even without regaining title to the property, [plaintiffs] could use the declaration as a predicate for a damages action against HUD in the Court of Federal Claims." Christopher Village, 190 F.3d at 315. After reviewing HUD's regulatory authority, the court concluded that although HUD's authority to grant or deny a rent increase is committed to HUD's unreviewable discretion, HUD could not lawfully refuse to "consider" a rent increase. The court held that under HUD's housing program, "all of the expenses of operating and maintaining a low income housing project must be paid out of rental revenue, which in turn are subsidized by HUD. The regulatory scheme does not contemplate that property owners must bear the risk of maintaining properties based on insufficient rental revenues." The court recognized that HUD could "refuse to provide financial assistance to an owner that has misappropriated funds, mismanaged the property, taken a profit instead of maintaining the property or has been negligent in its management in some other regard." The court then concluded that, "When those elements are absent, however, the statutes provide that HUD must ensure that the owner receives rents sufficient to meet at least the operating and maintenance expenses of the property."

Based on its review of the specific facts surrounding Christopher Village's ownership of the Mockingbird Run Apartments, the Fifth Circuit determined that plaintiffs had not been negligent

and had not misused any rental income. Accordingly, the court concluded that "HUD acted arbitrarily and capriciously when it refused to abide by its legal obligation to consider a rental increase request from a non-negligent owner and instead demanded a $2 million cash infusion and then declared the property in default for those very reasons." Id. at 319.

On September 21, 1999, plaintiffs filed suit in this court claiming that they are entitled to damages based on the Fifth Circuit's ruling in their favor. They also claim that a class of similarly-situated property owners should be certified. After several rounds of briefing, plaintiffs contend in their final brief that the class they purport to represent includes all low-income property owners that: 1) entered into a Regulatory Agreement with HUD; 2) entered into at least one Housing Assistance Payment Contract, or "HAP" contract, with HUD and had tenants with subsidized rents under Section 8; 3) had properties in distressed condition because they did not receive sufficient funds from HUD to *640 support or encourage rehabilitation; 4) were subjected to HUD's enforcement of the Regulatory Agreement requirement that they "maintain the property in good repair and condition"; and as a consequence 5) were forced by HUD to either default or seek additional equity or debt financing without assurance that these investments would be recouped. [FN5] Plaintiffs represent that they do not propose to include within the class any "owner that has misappropriated funds, mismanaged the property, taken a profit instead of maintaining the property or been negligent in its management in some other regard."

FN5. Plaintiffs laid out these factors in their April 9, 2001 reply to defendant's response to their supplemental brief in support of their motion for class certification. Plaintiffs contend that the putative class is delineated in an internal HUD document titled, "SWAT PORTFOLIO: ASSIGNED PROJECT LIST" and that each individual property owner whose project is listed as being within one of two enforcement categories on that list--either "Departmental Sanctions" or "Owner Compliance"--is a member of the putative class.

Defendant contends that plaintiffs' motion for class certification must be denied for various reasons, including those identified in the affidavit of Vyllorya A. Evans, who, as noted above, was once the director of HUD's SWAT program. Evans' affidavit states that the most comprehensive list of SWAT properties is found on the October 22, 1996 SWAT list, [FN6] and that based on a review of that list there are approximately 200 properties allegedly meeting plaintiffs' criteria for class certification. According to Evans, the SWAT list shows that forty-nine of the projects listed as having received a departmental sanction also received subsidies under Section 8. Similarly, 155 of the projects identified in the "Owner Compliance" category also received Section 8 subsidies.

FN6. In Vyllorya Evans' affidavit, she explains that HUD no longer maintains a SWAT Portfolio list, because it is no longer

using the SWAT approach. See supra note 2. As such, the only comprehensive SWAT list that HUD was able to produce was dated October 22, 1996. According to Evans, HUD followed its regular document retention procedures with regard to the documents relating to SWAT.
Plaintiffs seek sanctions against the government on the grounds that HUD failed to maintain all of its SWAT files after the program was ended in 1998, despite HUD's alleged knowledge of plaintiffs' potential class action. Whether or not to impose such sanctions for an alleged discovery violation is "a fact-specific inquiry." Ehrenhaus v. Reynolds, 965 F.2d 916, 920 (10th Cir.1992). A trial court's decision regarding such sanctions is accorded broad discretion. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976). In the case at bar, plaintiffs make their claim despite the fact that they have not shown that HUD could have anticipated this litigation. Moreover, plaintiffs have never sought any discovery from HUD in the three years that this case has been pending. In such circumstances, the request for sanctions is DENIED. See Gates Rubber Co. v. Bando Chemical Industries, Ltd., 167 F.R.D. 90, 101-104 (D.Colo.1996) (listing various factors to be considered in such circumstances, including knowledge of pending litigation, bad faith, and degree of prejudice caused); Kansas-Nebraska Natural Gas Co., Inc. v. Marathon Oil Co., 109 F.R.D. 12, 18 (D.Neb.1983) (declining

> to impose sanctions when records were destroyed by defendant "in the regular course of its business").

Evans goes on to state, however, that the fact that a property was referred to SWAT or included in the "Departmental Sanctions" or "Owner Compliance" categories of the SWAT list "tells very little about the project." More specifically, Evans explains that:

> A project may be listed under Department Sanctions, for example because it was in poor physical repair, because it was chronically delinquent in its mortgage payments, because the owner was suspected of misusing project funds, because the owner had refused to obtain management for the project which was acceptable to HUD, or for a variety of other reasons.

With respect to the "Owner Compliance" category, Evans states that there could also be a variety of reasons for the listing. "The owner may have financed repairs from its own resources, it may have obtained a rent increase or other financial assistance from HUD to pay for repairs, HUD-approved management may have been obtained, the mortgage delinquency could have been cured with HUD-approved secondary financing, or misspent project funds could have been returned."

In addition to the foregoing examples of potential differences among the projects listed *641 in the SWAT Portfolio and included in plaintiffs' putative class, the Evans affidavit also identifies several other factors that may make each project situation unique. Evans notes that other differences between SWAT-listed properties include: "a. owners that

may not have properly sought rent increases; b. owner[s] [that] may not be entitled to rent increase sought ...; g. owners [that] may have been formally found to be in contractual default prior to a rent increase request; ... and k. owners [that] may have already litigated and released claims against HUD."

In their reply brief, plaintiffs do not specifically challenge any of Evans' factual contentions. Instead, plaintiffs argue that the SWAT list should have only included properties with non-negligent owners, because HUD always had enforcement authority against negligent owners and therefore did not need a special program to address those situations. [FN7] In addition, plaintiffs assert that any factual differences are irrelevant because they only purport to represent the non-negligent project owners that were forced to default or to pay for repairs based on HUD's application of its unlawful enforcement policy, a policy to hold owners unconditionally liable for the cost of maintenance under their Regulatory Agreements and Section 8 contracts. [FN8]

FN7. Christopher Village relies extensively on discussions that took place during the 1997 ABA Conference between HUD and private attorneys to allegedly demonstrate that HUD was applying its enforcement policy with equal force against negligent and non-negligent owners. See supra note 1.

FN8. Plaintiffs have also filed a motion for partial summary judgment seeking to establish the reach of the Fifth Circuit

decision in this proceeding. Plaintiffs argue that under established principles of collateral estoppel, HUD may not re-litigate the lawfulness of its actions against Christopher Village in this court and that based on the Fifth Circuit's ruling, Christopher Village is entitled to damages. Christopher Village further argues that all the members of its putative class are also entitled to the benefits of the Fifth Circuit ruling based on collateral estoppel principles.

The government contends that Christopher Village has misread the scope of the Fifth Circuit's decision and that the Fifth Circuit did not address all of the issues relevant to a breach of contract case for damages in this court. Rather, the government contends, the Fifth Circuit resolved "only a narrow interpretative issue ... whether Christopher Village had an unconditional obligation to maintain the premises, regardless of HUD's willingness to review rent increase requests. The court answered the issue in the negative, and we do not intend to revive it...." Nonetheless, the government argues that the issue in this case is "whether Christopher Village breached its obligations and whether any such breaches were excused upon the basis of a corresponding Government breach." The government also argues that the Fifth Circuit decision may not be applied to members of Christopher Village's putative class.

Because the court is denying plaintiffs' motion to certify a class, plaintiffs' request for partial summary judgment regarding the application of the Fifth Circuit decision to

members of the putative class is hereby DENIED as moot. As for the plaintiffs themselves, the court will reserve ruling on the merits of plaintiffs' summary judgment motion until after oral argument is heard on that motion.

DISCUSSION

The Court of Federal Claims provides for litigation via class action in RCFC 23. "Class actions provide courts with the opportunity to promote good litigation management by balancing among [sic] a variety of competing interests, including time, efficiency, cost, and the right of individual plaintiffs to file complaints to redress perceived wrongs, preventing a multiplicity of suits based on a common wrong to all." Berkley v. United States, 45 Fed.Cl. 224, 226 (1999) (citations omitted). Class actions provide an avenue to correct otherwise unremediable wrongs, either because the "individual claims involved are too small, or the claimants are too widely dispersed." Id. at 226. Although RCFC 23 provides for class certification, the rule offers little guidance for the court to follow in considering class certification. Rule 23 simply states that, "The court shall determine in each case whether a class action may be maintained and under what terms and conditions." To assist in deciding the appropriateness of a requested class certification, members of this court have turned to a decision of the United States Court of Claims, the predecessor court to the United States Court of Appeals for the Federal Circuit, which established an eight-prong test to be applied by the trial court in deciding whether to certify a class. See Quinault

Allottee *642 Ass'n v. United States, 197 Ct.Cl. 134, 453 F.2d 1272 (1972).

[1][2] Under the Quinault test, a plaintiff must demonstrate that: 1) the class is large but manageable; 2) there is a question of law common to the whole class; 3) the common question of law predominates over individual questions of fact; 4) plaintiff's claim is typical of those claimed by class members; 5) the government's action is generally applicable to the class; 6) the claims of the class members are too small to be pursued individually; 7) the plaintiff will adequately represent the class; and 8) individual actions would create the risk of varying adjudications. See Quinault, 197 Ct.Cl. at 140-41, 453 F.2d 1272. In applying the eight-prong Quinault test, this court must be mindful of the numerous cases that begin with the admonition that class action suits in the Court of Federal Claims are "generally disfavored." Hannon v. United States, 31 Fed.Cl. 98, 102 (1994); Berkley, 45 Fed.Cl. at 228 (listing numerous cases which cite the disfavored status of class actions in the Court of Federal Claims). Thus, in evaluating class action requests such as this one, courts must carefully consider the various Quinault factors. In addition, courts are required to make the factual and legal inquiries necessary to ensure that class certification is appropriate. See Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 676 (7th Cir.2001) ("This would be plain enough if, for example, the plaintiff alleged the class had 10,000 members, making it too numerous to allow joinder ... while the defendant insisted that the class contained only 10 members. A judge would not and could not accept the plaintiff's assertion as conclusive; instead the judge would receive evidence (if only by affidavit) and

resolve the disputes before deciding whether to certify the class.").

Applying the Quinault test to the present facts, Christopher Village argues that all eight prongs have been satisfied and that a class should therefore be certified. The court disagrees. Specifically, as discussed below, the court finds that plaintiffs fail to satisfy prongs three, four, six, and eight. Having failed to satisfy half of the Quinault factors, the court finds that class certification is not appropriate. [FN9]

> FN9. Because the court finds that plaintiffs have plainly failed to satisfy four of the Quinault factors, it is not necessary to evaluate the remaining factors. Even if the remaining four factors were resolved in plaintiffs' favor, it would not tip the balance in favor of class certification.

The third Quinault factor

[3] It is well-recognized in this court that the third Quinault factor is among the most important. The third Quinault factor requires a finding that a common legal question predominates over separate factual issues affecting individual members of the putative class. Several cases have noted that:

> A showing of common factual issues should be weighed more heavily than a showing of common legal issues in granting certification.... Insofar as factual issues are truly common to large groups of potential plaintiffs, class certification may be useful in avoiding repetitive lawsuits and in

> spreading the burden of litigation. On the other hand, the Claims Court can resolve common legal issues relatively inexpensively by motion in a single case.

Cooke v. United States, 1 Cl.Ct. 695, 698 (1983). See also Banner v. United States, 38 Fed.Cl. 700, 703 (1997) ("Factual commonality is more determinative than legal commonality when considering class certification because factual issues are generally difficult and expensive to litigate, whereas legal issues may be resolved quickly and inexpensively through motions in a single case."); Cutright v. United States, 15 Cl.Ct. 576, 579 (1988) ("In granting class certification common factual issues should be weighed more heavily than common legal issues.").

The plaintiffs argue that they have satisfied this prong because HUD imposed the same policy of "absolute financial responsibility" for maintaining low-income multifamily housing on all of the project owners identified on the SWAT list, and therefore HUD breached its Regulatory Agreements and HAP contracts with all putative class members. The government counters that plaintiffs have failed to satisfy the third Quinault prong because even if HUD's enforcement policy is contrary to a statute, regulation, or contract, each class member must still prove *643 individually that it is entitled to damages. See Busby v. United States, 8 Cl.Ct. 596, 603 (1985) ("The plaintiffs, and the class they seek to represent, claim damages. Each plaintiff and members of the class they seek to represent would be required to prove specifically entitlement to the damages claimed."). In particular, the government argues that in order to establish a right to damages, each class member must still show that HUD failed

to provide them with adequate rents or other payments to meet their maintenance obligations. Indeed, the government notes that since the linchpin of each case would be HUD's alleged failure to provide adequate contributions to maintain the low-income project, each case by necessity would require project-specific determinations about the reasonableness of HUD's actions with regard to each individual owner's alleged rent requests. In addition, the government argues, the court would also be required to evaluate the reasonableness of each owner's actions with respect to the rent it received.

The court agrees with the government. While plaintiffs argue that they do not purport to represent any class members who misappropriated rents or mismanaged their property, they fail to appreciate that HUD's policy of unconditional responsibility for project maintenance will only support a damage claim if the owner can demonstrate to the court that it managed its property responsibly and performed required maintenance using the rents it did receive.

Moreover, even if each individual class member could show that HUD illegally refused to provide it with adequate rents to cover expenses, each owner would still be subject to the government's proof that a prior breach of contract by the owner nonetheless excused that breach. For example, the Evans affidavit notes that some owners identified on the SWAT list may have been in default of their Regulatory Agreement or HAP contracts for failing to previously repair their properties after having received an earlier rent increase.

Finally, before any putative class member could

receive a damage award, the court would require individualized proof of the actual damages incurred by every single low-income property owner. Plaintiffs' suggestion that damages could be easily quantified by determining whether HUD received a cash infusion or forced an owner into foreclosure is unsupported. This court would not be able to determine damages for any party without individual presentations of evidence regarding the amounts lost by those owners, minus the amounts they would otherwise have been required to pay in the absence of the alleged breach.

For all of these reasons, the court concludes that the substantial factual differences between plaintiffs and the putative class members with regard to both entitlement to and the amount of damages plainly overshadow any common legal issues that exist. The variety of unique circumstances surrounding each owner's relationship with HUD plainly counsels against class certification.

The fourth Quinault factor

[4] Plaintiffs have also failed to demonstrate that their claims are typical of those claimed by potential class members, as required under the fourth Quinault factor. Plaintiffs' contention that their claims define the class is not correct. In contrast to the class members they seek to represent, the plaintiffs in this case have already litigated many of the relevant issues before the district court and Fifth Circuit. The plaintiffs in the instant action had the opportunity to present the unique factual circumstances of their contractual relationship with HUD, and the Fifth Circuit ruled in their favor and sent them to this court to seek damages. None of

the putative class members that the plaintiffs are now seeking to represent have established the right to damages. Each putative class member has a different historical relationship with HUD, and a different set of circumstances that may or may not establish a contract breach.

For example, the present plaintiffs have a Fifth Circuit finding that the government had failed to prove that Christopher Village had either mismanaged the Mockingbird Run Apartments or received sufficient rent increases to pay for needed maintenance. Plaintiffs argue that principles of collateral estoppel bar the government from relitigating *644 those findings in this court. While this may very well be true as to Christopher Village and Wilshire Investments Corporation, it is clearly not true as to any other hoped-for class members. Assuming arguendo that the Fifth Circuit considered the issues that will be examined by this court in adjudicating plaintiffs' damage claim (as noted supra, the court will rule on plaintiffs' summary judgment motion separately), none of the other purported class members have established similar facts. In such circumstances, these plaintiffs will not be required to litigate certain issues that other members of the putative class must litigate. Accordingly, plaintiffs are not typical of the class members they seek to represent. Plaintiffs fail to satisfy the fourth Quinault factor.

The sixth Quinault factor

[5] Under the sixth Quinault factor, plaintiffs must demonstrate that the claim of each putative class member is too small to be pursued individually. "The relevant inquiry under this criterion is whether

the class members would pursue the claim if the class was not certified." Taylor v. United States, 41 Fed.Cl. 440, 447 (1998) (citation omitted). Plaintiffs allege that they meet this criterion because they purport to represent the thousands of individual limited partners that own the low-income housing projects identified on the SWAT list. Plaintiffs assert that the damages for each partnership within the proposed class are likely to run between $500,000 and $2 million apiece, however, given the hundreds of individual limited partners, each individual limited partner will only likely recover between $5,000 and $10,000. Plaintiffs argue that this amount is not large enough to justify individual lawsuits by each limited partner.

Plaintiffs' argument that the amount owed to each individual limited partner is too small to justify separate actions is wholly unpersuasive. To begin with, the present action has been filed only in the name of the limited partnership and the general partner; it was not filed in the name of the alleged 500 individual limited partners with an interest in Christopher Village and Wilshire Investment Corporation. Certainly, the present plaintiffs have deemed it worthwhile to pursue this claim against HUD, and there is no reason to believe that other low-income property partnerships will not reach the same conclusion and file suit for the benefit of their individual partners. This is particularly true where, as here, plaintiffs contend that each partnership is entitled to $500,000 to $2 million. These are sums that are certainly worth the cost of litigation. The suggestion that limited partners will not file individual suits in the absence of a certified class is of no moment. HUD entered into contracts with specific partnerships, and those partnerships have

an incentive to pursue claims for several million dollars. Under these facts, the court finds that individual actions by the separate partnerships are likely to be maintained despite the denial of class certification. Thus, plaintiffs have failed to meet the sixth prong of the Quinault test.

The eighth Quinault factor

[6] Finally, plaintiffs have failed to satisfy the eighth prong of the Quinault test. The eighth prong pertains to the risk of inconsistent adjudications. Here, there is virtually no risk of inconsistent adjudication because cases against the United States based on a breach of contract claim in the amounts asserted here may only be heard in the Court of Federal Claims and reviewed by the Federal Circuit. Moreover, in light of the individual factual issues which will govern the outcome of each case, the differences among adjudications likely will be based on differences in the factual circumstances of each case, and not on differing views of the legal questions presented. Contrary to plaintiffs' assertions, the court does not believe that this eighth factor is "irrelevant." There may be circumstances where potential class members are so similar (as in a partnership tax case or back pay case) that not treating the members of the class together in a single action could result in the potential for inconsistent rulings on recovery. In this case, however, the factual circumstances of each project owner's situation and the amount of damages are bound to be so unique that "consistency" does not weigh in favor of certification.

*645 CONCLUSION

For the foregoing reasons, the court finds that plaintiffs have not met the requirements for class certification as set forth in RCFC 23 and Quinault. Plaintiffs have not demonstrated that certification in this action will serve the interests of justice or is otherwise appropriate. [FN10] Therefore, the court DENIES plaintiffs' September 21, 1999 motion for class certification.

> FN10. The fact that class certification is not appropriate in this instance does not, however, foreclose the possibility that if other actions are later filed by other project owners, other case management techniques may be deemed appropriate. The court has, on other occasions, worked with parties to coordinate discovery or briefing on related issues found in separate cases, where the cases share common legal issues but the individual claims for damages are predicated on very different factual questions.

IT IS SO ORDERED.

50 Fed.Cl. 635

END OF DOCUMENT

United States Court of Federal Claims.

CHRISTOPHER VILLAGE, LP, and Wilshire Investments Corp., Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 99-775C.

Filed: July 24, 2002.
As modified: Aug. 5, 2002.

Limited partnership and its general partner brought suit against the United States, as owners of federally subsidized low income housing project, alleging that foreclosure by the United States Department of Housing and Urban Development (HUD) constituted a breach of plaintiffs' contracts with HUD. On cross-motions for summary judgment on liability, the Court of Federal Claims, Firestone, J., held that: (1) res judicata and collateral estoppel did not preclude the government from asserting defense of prior material breach; (2) prior material breach by owner which occurred when owner submitted false certificates to (HUD) to support requested rent increases excused subsequent breach by HUD when it declared owner in default before it considered owner's proposal for rent increases, and (3) settlement agreement in which the United States agreed not to take any further affirmative enforcement actions with respect to fraudulent certifications did not bar its reliance on the certifications to defend breach of contract claim asserted by owner.

Plaintiffs' motion denied; defendant's cross-motion

granted.

West Headnotes

[1] Judgment 619
228k619 Most Cited Cases

Whether a defense is barred by res judicata turns on whether the defense could have been raised in the prior action.

[2] Judgment 584
228k584 Most Cited Cases

[2] Judgment 713(2)
228k713(2) Most Cited Cases

Under the doctrine of claim preclusion, a judgment on the merits precludes the same parties from relitigating issues in a subsequent action that were or could have been raised in the prior action.

[3] Judgment 577(2)
228k577(2) Most Cited Cases

Where the first court did not have jurisdiction over the particular claim being considered by the second court, the principles of res judicata do not apply. Restatement (Second) of Judgments § 24 comment.

[4] Judgment 577(2)
228k577(2) Most Cited Cases

[4] Judgment 739
228k739 Most Cited Cases

Res judicata presumes that the first court had jurisdiction over the claim sought to be precluded, even if it was not raised; however, if the claim could not have been raised in the earlier proceeding, then res judicata cannot bar the subsequent action in the second court, or defenses to the action.

[5] Judgment 🔑619
228k619 Most Cited Cases

[5] Judgment 🔑739
228k739 Most Cited Cases

Res judicata and collateral estoppel rising from prior declaratory judgment that the Department of Housing and Urban Development (HUD) violated its regulations and contracts when it declared owner of low income housing project in default before it considered owner's proposal for rent increases, did not preclude the government from asserting defense of prior material breach to owner's breach of contract claim in the Court of Federal Claims, as that could not have been raised in prior suit and was not litigated.

[6] United States 🔑73(3)
393k73(3) Most Cited Cases

Prior material breach excuses a subsequent breach by the government.

[7] United States 🔑73(3)
393k73(3) Most Cited Cases

Prior material breach by owner of low income housing project which occurred when owner submitted false certificates to the Department of

Housing and Urban Development (HUD) to support requested rent increases excused subsequent breach by HUD when it declared owner in default before it considered owner's proposal for rent increases.

[8] United States 74(6)
393k74(6) Most Cited Cases

Settlement agreement in which the United States agreed not to take any further affirmative enforcement actions with respect to fraudulent certifications in support of proposed rent increases submitted to the Department of Housing and Urban Development (HUD) by owner of low income housing project did not bar government from relying on existence of fraudulent certifications to defend breach of contract claim asserted by owner, as settlement said nothing regarding the government's ability to defend itself from claims levied by parties involved in the action.
*183 E. Grey Lewis, Washington, DC, for plaintiff. Ernest C. Baynard, III, of counsel.

Steven J. Gillingham, Washington, DC, with whom were Robert D. McCallum, Jr., Assistant Attorney General and Director David M. Cohen, for defendant. Nancy Christopher and Geoffrey L. Patton, U.S. Department of Housing Urban Development, of counsel.

OPINION

FIRESTONE, Judge.

This action is brought by plaintiffs Christopher Village, Limited Partnership ("Christopher

Village") and Wilshire Investments Corporation ("Wilshire") (hereinafter referred to jointly as plaintiffs). Plaintiffs are seeking damages in connection with the government's actions in foreclosing upon plaintiffs' low-income housing complex, called Mockingbird Run Apartments, in Bryan, Texas. The complaint alleges that the foreclosure by the United States Department of Housing and Urban Development ("HUD") constituted a breach of plaintiffs' contracts with HUD.

The case is presently before the court on the parties' cross-motions for summary judgment on liability. [FN1] Plaintiffs claim that they are entitled to summary judgment as to liability based upon the findings and conclusions of the United States Court of Appeals for the Fifth Circuit in Christopher Village, LP v. Retsinas, 190 F.3d 310 (5th Cir.1999). In that action, the Fifth Circuit determined that: 1) HUD acted arbitrarily and capriciously in declaring Christopher Village in default before it considered Christopher Village's proposal for rent increases; and 2) its declaration could be used by Christopher Village as a "predicate for damages against HUD in the Court of Federal Claims." Now that plaintiffs are before this court seeking to enforce their alleged contract rights, they contend that the Fifth Circuit's ruling bars the government from relitigating the issue of breach, and that it is therefore entitled to a finding of liability against HUD as a matter of law.

FN1. On October 26, 2001, the court denied plaintiffs' motion to certify a class of similarly-situated HUD contractors under

Rule 23 of the Court of Federal Claims. In brief, the court determined that future disposition of each putative class member's claims on both liability and damages will require an examination of the individual facts of each separate case, making the certification of a class inappropriate in this instance. The plaintiffs appealed that ruling to the Federal Circuit, and on November 29, 2001, the Circuit rejected the appeal on the grounds that a party may not seek interlocutory review of the denial of class certification under the Rules of the Court of Federal Claims ("RCFC"). See 25 Fed.Appx. 922 (Fed.Cir.2001) (unpublished). Following that ruling, briefing resumed on the plaintiffs' August 2, 2001 motion for partial summary judgment as to liability. The government filed its cross-motion for summary judgment as to liability on March 8, 2002.

The government opposes plaintiffs' motion and argues that it is entitled to summary judgment on the grounds that even if HUD breached its contracts with plaintiffs by failing to consider its rent increase requests--a proposition the government disputes--the breach was excused by plaintiffs' prior material breach. In particular, the government argues that plaintiffs materially breached their contracts with HUD when they submitted false certificates to support the rent increases they claimed that HUD had improperly ignored. The government contends that plaintiffs' fraudulent acts provide the government with a complete defense to liability. The government also argues that in any event, HUD

was justified in holding plaintiffs in default because plaintiffs had allowed the Mockingbird Run premises to fall into severe disrepair well before the plaintiffs sought the rent increases upon which this litigation is based.

I. BACKGROUND

A. Historic Facts

The undisputed facts may be summarized as follows. For more than twenty years, *184 Christopher Village owned the Mockingbird Run Apartments, a low-income housing complex with mortgages guaranteed by HUD under the National Housing Act of 1934, codified at 12 U.S.C. § 1701-1750g (2002). Under § 221(d)(3) of this Act ("Section 221"), HUD is authorized to insure loans made by private developers and others for the purpose of building and maintaining multifamily housing facilities for low and moderate income tenants. See id. § 1715(d)(3). The owners of Section 221 properties are allowed to sign non-recourse notes and are entitled to certain tax benefits, including accelerated depreciation. See 26 U.S.C. § 168(b)(4) (2002). In return for these benefits, an owner must enter into a "Regulatory Agreement" with HUD. These Regulatory Agreements give HUD extensive authority over the operation and maintenance of the subject properties. Among the obligations established by the Regulatory Agreement is the requirement that owners maintain their projects in good condition: Section 7 of the Regulatory Agreement provides that owners must, "maintain the mortgaged premises, accommodation, and the grounds and equipment appurtenant thereto, in good repair and

condition." The Regulatory Agreement also contains provisions requiring that, "payment for services, supplies, or materials shall not exceed the amount ordinarily paid for such services, supplies or materials in the area where the services are rendered or the supplies or materials are furnished."

In addition to these Regulatory Agreements, HUD has statutory authority to enter into Housing Assistance Payment ("HAP") contracts pursuant to section 8 of the National Housing Act of 1937, 42 U.S.C. § 1437 (2002) ("Section 8"). Section 8 allows HUD to provide rental assistance to residents of non-government owned multi-family housing projects. 42 U.S.C. § 1437f. Under Section 8, HUD provides housing assistance payments directly to the owner. Many of the provisions of these HAP contracts are mandated by statute and regulation, including the requirement that owners maintain their projects in good repair.

The Regulatory Agreements and HAP contracts also address HUD's obligations with regard to setting rents for the subject properties. Pursuant to the Regulatory Agreements, HUD must evaluate and approve project rents. Once rents are set, HUD must also evaluate and approve any requested rent increases. Among the issues HUD must consider in evaluating a proposed rent increase are the project's operating costs and debt service (as calculated by HUD), and the owner's return on investment, with adjustments for vacancies, the project's non-rental income, and other factors HUD deems to be appropriate. See 24 C.F.R. § 886.112(b) (2001). With respect to properly-supported requests for rent increases, pursuant to the Regulatory Agreement, HUD is required to: "Approve [those increases]

that are necessary to compensate for any net increase occurring since the last approved rental schedule, in taxes ... and operating and maintenance expenses over which Owners have no effective control, or Deny the increase stating the reasons therefor." Regulatory Agreement § 4(g). The HAP contracts provide that rents are to be adjusted according to HUD regulations and administrative procedures, and further provide that HUD may consider an owner to be in default of the HAP contract when the owner has, among other things: "furnished any false statements or misrepresentations to HUD in connection with HUD mortgage insurance, loan processing or administration of the contract."

The present case arises out of the Regulatory Agreement and HAP contracts entered into between HUD and Christopher Village. In 1995, HUD decided to take action against Christopher Village based on HUD's conclusion that the Mockingbird Run Apartments had become severely run down. At that time, HUD estimated that the cost of necessary maintenance repairs at the Mockingbird Run Apartments exceeded $1 million. As a consequence, HUD placed the project on its list of the nation's most troubled low-income housing properties. This consequently subjected the Mockingbird Run Apartments and its managers to certain enforcement actions prescribed by a HUD enforcement program designed to identify and improve the physical *185 and financial conditions of HUD's most troubled subsidized properties. [FN2]

FN2. Plaintiffs have provided the court with

certain background information regarding HUD's contemporaneous increased focus on enforcement as a means of placing responsibility for maintenance on the shoulders of the owners, including the transcript of an American Bar Association workshop on HUD enforcement activities held on May 29, 1997. At that workshop, various HUD officials explained their intention to strictly enforce the maintenance requirements set forth in HUD's Regulatory Agreements and Section 8 contracts.

HUD's actions in connection with the property have already been the subject of litigation between plaintiffs and HUD. See Christopher Village, LP v. Retsinas, 190 F.3d 310 (5th Cir.1999). The key facts in that litigation are set forth in the Fifth Circuit's decision. In brief, in April 1995, HUD informed plaintiffs that their failure to refurbish the property could result in their loss of Section 8 rent subsidies under their HAP contract, and could lead to a default of their Regulatory Agreement. HUD took the position that under the Section 8 HAP contract and Regulatory Agreement, Christopher Village had an absolute or unconditional obligation to maintain the project. In June 1995, plaintiffs asked HUD for a rent increase in order to meet HUD's demands for refurbishing the project. Without acting on the rent increase request, HUD sent a letter to plaintiffs on August 25, 1995, reiterating its contention that Christopher Village had a contractual obligation to maintain the premises and demanding that plaintiffs place $2 million in escrow to pay for the necessary repairs. On September 6, 1995, HUD sent a second letter

stating that it would not act on plaintiffs' requested rent increase until plaintiffs agreed to comply with the August 25 letter. When plaintiffs failed to place the $2 million cash infusion in escrow, HUD notified plaintiffs that they were in default of their Regulatory Agreement. As a result, the federally-insured mortgage was assigned to HUD, which took possession of the property as mortgagee in possession on December 1, 1995.

In response to HUD's actions, the plaintiffs filed suit against HUD in the United States District Court for the Southern District of Texas. In that Texas lawsuit, plaintiffs sought to set aside HUD's actions on the grounds that HUD's failure to consider their rent increase request was unlawful, the demand for $2 million was illegal, and that without sufficient rental revenue it was impossible for plaintiffs to maintain the property. Settlement efforts failed when HUD refused Christopher Village's offer to fund the repairs through a rent increase. Subsequently, the district court denied plaintiffs' requested relief and granted summary judgment for HUD. The district court held that under Christopher Village's agreements with HUD, Christopher Village had an absolute obligation to maintain the property, without regard to HUD's approval of any rent increases. Plaintiffs' request for a stay pending appeal was denied by both the district court and court of appeals, and HUD slated the property for sale. HUD subsequently sold Mockingbird Run Apartments to the City of Bryan, Texas for $10.00.

On appeal, the Fifth Circuit found that several of plaintiffs' claims were moot by virtue of the sale of the property, but concluded that Christopher Village's claim for declaratory relief remained.

Specifically, the Fifth Circuit noted that, "A declaration that HUD violated its regulations and contracts grants [plaintiffs] adequate relief because, even without regaining title to the property, [plaintiffs] could use the declaration as a predicate for a damages action against HUD in the Court of Federal Claims." Christopher Village, 190 F.3d at 315. After reviewing HUD's regulatory authority, the court concluded that although HUD's authority to grant or deny a rent increase is committed to HUD's unreviewable discretion, HUD could not lawfully refuse to "consider" a rent increase. The court held that under HUD's housing program, "all of the expenses of operating and maintaining a low income housing project must be paid out of rental revenues, which in turn are subsidized by HUD. The regulatory scheme does not contemplate that property owners must bear the risk of maintaining properties based on insufficient rental revenues." The court recognized that HUD could "refuse to provide financial assistance to an owner that has *186 misappropriated funds, mismanaged the property, taken a profit instead of maintaining the property, or been negligent in its management in some other regard." The court concluded, however, that, "When those elements are absent, however, the statutes provide that HUD must ensure that the owner receives rents sufficient to meet at least the operating and maintenance expenses of the property." Id. at 317-18.

Based on its review of the facts then known in connection with the plaintiffs' ownership of the Mockingbird Run Apartments, the Fifth Circuit determined that plaintiffs had not been negligent and had not misused any rental income. Accordingly, the court concluded that, "HUD acted

arbitrarily and capriciously when it refused to abide by its legal obligation to consider a rental increase request from a non-negligent owner and instead demanded a $2 million cash infusion and then declared the property in default for those very reasons." Id. at 319.

B. Later-Discovered Facts

In 2001, after the Fifth Circuit's ruling and while the present action for damages was pending in this court, the Northern District of California resolved two legal actions involving certain parties appearing now before this court. The related litigation in California brought the following undisputed facts to light. Apparently, without HUD's knowledge, Christopher Village's general partner, Wilshire Investments Corp., had submitted false statements to HUD in connection with plaintiffs' requests for rent increases for the Mockingbird Run Apartments. These false statements were made in violation of HUD regulations and the specific terms of the HAP contract with plaintiffs, which prohibited the submittal of, "any false statements or misrepresentations to HUD in connection with HUD mortgage insurance, loan processing or administration of the contract." The circumstances surrounding those false statements are set forth in three separate documents, collectively called the "Global Settlement": 1) the March 30, 2001 Plea Agreement entered into by the Management Assistance Group, Inc. ("MAGI") and signed by Deane Earl Ross on its behalf; 2) the March 30, 2001 Consent Judgment entered into by Wilshire, MAGI, and AFC, as well as several other AFC affiliates, and signed by A. Bruce Rozet and Mr. Ross on behalf of the AFC defendants, and by Mr.

Robert Bonner, attorney for Mr. Rozet, Mr. Ross, MAGI, and Wilshire; and 3) the Administrative Agreement, again signed by Mr. Rozet, Mr. Ross, and by Mr. Bonner for Wilshire, MAGI, AFC, and its other named affiliates. This Global Settlement and the related evidence shows that MAGI--with AFC and Wilshire, among others--took advantage of its management of HUD projects to defraud HUD. As such, MAGI, AFC, and Wilshire were all party to the federal government's prosecution for the insurance scheme. [FN3] It is further undisputed that MAGI was itself a limited partner in the Christopher Village Limited Partnership.

> FN3. The above-recited facts are taken from the government's March 8, 2002 Statement of Supplementary Facts, to which the plaintiff did not respond. Under Rule 56(e) of the Federal Rules of Civil Procedure, these facts, which served as the basis for the Plea Agreement containing MAGI's guilty plea, United States v. Management Assistance Group, Inc., No. CF 00-0084-SC (N.D.Cal. Mar. 30, 2001), and the Consent Judgement and Administrative Agreement in United States v. Rozet, No. C97-1704-SC, 2001 WL 348970 (N.D.Cal. Mar. 30, 2001), are deemed admitted. Combined, these documents establish that all four companies--Christopher Village, Wilshire, AFC, and MAGI--were intertwined for business purposes.

In the MAGI Plea Agreement, MAGI pleaded guilty and acknowledged that it had engaged in an

illegal insurance kickback scheme, in which Wilshire (on behalf of Christopher Village) and other MAGI affiliates billed HUD for insurance payments that included these illegal kickback payments. Under the scheme, MAGI procured an umbrella property insurance policy for MAGI-affiliated properties, including the Mockingbird Run property, to satisfy HUD's requirement that the properties maintain insurance. According to the Plea Agreement, MAGI defrauded HUD by requiring the insurance broker to pay a kickback to retain MAGI's business. The insurance broker, in turn, invoiced MAGI's affiliates, including Christopher Village, for the cost of both the insurance and the kickback. With respect to the *187 Mockingbird Run property, Christopher Village then provided HUD with a line-item budget that included a line-item for insurance costs. [FN4] In 1992, 1993, and 1995, Christopher Village supported its requests for a rent increase with these increased insurance costs. These requests also contained the certification HUD required concerning the reasonableness of the expenses.

FN4. The insurance kick-back scheme was described in detail in a declaration made by Benjamin Richman, who worked as an insurance broker for the company that secured the fraudulent insurance master policy at issue. According to Mr. Richman, Christopher Village's Mockingbird Run was one of the projects included by AFC in the master policy, which included the unlawful kickback fees. Plaintiffs do not challenge the fact that the Mockingbird Run Apartments were involved in the scheme.

> As such, it is clear that Wilshire Investments, the general partner in the Christopher Village Limited Partnership, was part of the fraud. Again, plaintiffs never submitted any evidence or affidavit to challenge Mr. Richman's statements, which are therefore deemed true.

Under the terms of the Plea Agreement, MAGI, with its principals and affiliates, agreed to take specific actions to correct their past wrongdoings and to prevent future abuses. In addition, MAGI, with its principals and affiliates, agreed to comply with the terms and conditions of a separate Consent Judgment and Administrative Agreement, which were incorporated into the Plea Agreement. Under the terms of the Consent Judgment--which, as already noted, names both AFC and Wilshire as parties--the affiliates that had participated in MAGI's scheme agreed to pay the government $8.125 million for any alleged damages arising from the scheme. The Consent Judgment further provided that if MAGI and its named affiliates, including Wilshire, fulfilled their obligations under the Consent Judgment and Administrative Agreement, they would be released from, "any administrative monetary or civil monetary claim" that the United States or HUD might have under the False Claims Act, various other statutes, and, "any other statute of common law theories, creating causes of action for civil damages or civil penalties for submitting or causing to be submitted [false] claims to the government."

In addition, under the terms of the Administrative Agreement--in which AFC and Wilshire are again

identified as parties--these same affiliates agreed, among other things, to divest themselves of any general partnership interests in HUD-assisted properties. During the divestiture period, however, HUD agreed to treat requests by certain of these affiliates (including Wilshire) fairly and to renew their contracts and provide them with grants if it would be beneficial to HUD tenants. The administrative agreement also provided that HUD would not "seek civil money penalties ... for any conduct alleged as the basis for liability in the civil or criminal action, for the financial defaults resulting in the foreclosure of HUD properties prior to the date of this agreement ...."

Finally, the Consent Judgment provided that it could not be changed without the agreement of the parties and court approval. The Administrative Agreement similarly provided that it could not be modified without the approval of all parties.

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). See RCFC 56(c). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Liberty Lobby, 477 U.S. at 247-48, 106 S.Ct. 2505. In deciding whether summary judgment is appropriate, it is not

the court's function "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249, 106 S.Ct. 2505.

B. Principles of Res Judicata Do Not Bar the Government from Asserting a Defense to Plaintiffs' Breach of Contract Claim

Plaintiffs argue that the government is barred from challenging contract liability for *188 breach on the grounds that the Fifth Circuit's decision is res judicata with respect to liability. In particular, plaintiffs argue that the Fifth Circuit's conclusion that HUD violated its regulations and contracts with plaintiffs is binding on this court, and that "the government is precluded by res judicata from raising the defenses [raised before the Fifth Circuit], or any other, in this proceeding."

The government counters that res judicata does not bar the government from raising defenses to plaintiffs' breach of contract claim, because the Fifth Circuit action did not involve the same issue. According to the government, res judicata bars only claims or defenses that were or could have been raised in the prior action. See Faust v. United States, 101 F.3d 675, 677 (Fed.Cir.1996) (citing Allen v. McCurry, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)). The government contends that because the Tucker Act gives the Court of Federal Claims exclusive jurisdiction over plaintiffs' breach of contract claim, that claim was not before the Fifth Circuit, and therefore the government could not have litigated its breach of contract defenses. In such circumstances, the government contends that the claim and defense preclusion

aspects of res judicata cannot apply to bar the government from defending the breach of contract case now properly before this court.

[1][2][3][4] The court agrees with the government. Whether a defense is barred by res judicata turns on whether the defense could have been raised in the prior action. As the Federal Circuit has recently noted, "under the doctrine of claim preclusion [res judicata] a judgment on the merits precludes the same parties from relitigating issues in a subsequent action that were or could have been raised in the prior action." Faust, 101 F.3d at 677. Where as here, however, the first court did not have jurisdiction over the particular claim being considered by the second court, the principles of res judicata do not apply. See RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. g (1980). Res judicata presumes that the first court had jurisdiction over the claim, even if it was not raised. However, if the claim could not have been raised in the earlier proceeding, then res judicata cannot bar the subsequent action in the second court, or defenses to the action. As such, res judicata does not bar the government from raising defenses to plaintiffs' breach of contract claim in this instance.

[5] While the Fifth Circuit held that, "There is no statutory or regulatory basis for imposing on a conscientious low-income housing operator the risk of uncompensated dilapidation or deterioration," Christopher Village, 190 F.3d at 318, it is up to this court to decide whether or not plaintiffs, through their actions under the contract with HUD, constituted a "conscientious low-income housing operator" such that the plaintiffs upheld their end of the contract bargain. The Fifth Circuit clearly

recognized that it was up to this court to rule on the contract question, using as a "predicate" its finding that a breach had occurred when HUD failed to consider plaintiffs' rent increase requests.

This court must therefore disagree with plaintiffs' argument, and finds that res judicata does not bar the government from raising defenses to plaintiffs' breach of contract claim. However, as discussed at oral argument, the court recognizes that principles of collateral estoppel, or issue preclusion, do operate to bar the government from relitigating issues that were "actually litigated" before the U.S. Court for the Western District of Texas as well as the Fifth Circuit. In Banner v. United States, 238 F.3d 1348 (Fed.Cir.2001), the Federal Circuit held that parties are barred from revisiting issues that have been litigated by the same parties based on the same cause of action, where: "(1) the issues are identical to those in a prior proceeding, (2) the issues were actually litigated, (3) the determination of the issues was necessary to the resulting judgment, and (4) the party defending against preclusion had a full and fair opportunity to litigate the issues." Id. at 1354. For purposes of this litigation, then, it is plain that the government is estopped from challenging the Fifth Circuit's conclusion that its refusal to consider the plaintiffs' requests for a rent increase *189 violated HUD regulations and contracts. [FN5]

FN5. In the alternative, the government argues that plaintiffs had historically sought inadequate rent increases to meet HUD's maintenance requirements, which also excuses the government's breach. Plaintiffs

> argue that the government is also estopped from raising this argument. Because the undisputed fraud discussed infra is dispositive, the court need not reach this issue.

Although collateral estoppel bars the government from challenging HUD's breach, collateral estoppel does not bar the government from defending that breach based on prior material breach. There is no dispute that plaintiffs' fraudulent conduct was not litigated in the earlier lawsuit: allegations of plaintiffs' fraudulent rent requests were not presented to the court during the lawsuit in Texas, and resolution of those allegations of fraud did not occur until 2001. Indeed, the Fifth Circuit's decision is premised upon its "assumption" that plaintiffs had acted lawfully as "conscientious low-income housing operators."

In view of the forgoing, because neither the principles of res judicata nor collateral estoppel bar the government from raising a defense to plaintiffs' breach claim, the court now turns to those defenses.

C. Plaintiffs' Submission of Fraudulent Rent Requests Constitutes a Prior Material Breach

The plaintiffs do not dispute that they submitted false certifications in support of their rent increase requests and that plaintiffs used HUD funds to pay for, at least in part, illegally-inflated insurance costs. As noted above, plaintiffs have not presented any facts to challenge the government's supplementary findings of uncontroverted fact, which state that MAGI entered a guilty plea based

in part upon its having received illegally-inflated insurance expenses from HUD in the form of rents received for their HUD properties, including Mockingbird Run Apartments. The undisputed facts establish that plaintiffs violated the following Regulatory Agreement provisions: (1) the prohibition on disbursement of project funds for anything other than "reasonable operating expenses and necessary repairs"; and (2) the requirement that "payment for services, supplies, or materials shall not exceed the amount ordinarily paid for such services, supplies or materials in the area where the services are rendered." In addition, these illegally-inflated insurance charges violated plaintiffs' HAP contract, which required justifications of the reasonableness of expense increases and required owners to submit certifications attesting to the reasonableness of those expenses. Here, the undisputed facts establish that Wilshire, on behalf of Christopher Village, submitted certifications to HUD seeking rent increases for the Mockingbird Run Apartments, including a share of the illegally-inflated insurance premiums from the scheme arranged through AFC and MAGI. [FN6]

FN6. At oral argument, plaintiff made much of the fact that Christopher Village, the limited partner and project "owner," was not found guilty of anything related to MAGI's and Wilshire's fraudulent conduct. First, that is not true. MAGI was a limited partner in the Christopher Village partnership, and Wilshire signed the HAP contract with HUD on behalf of Christopher Village. Second, Christopher Village cannot separate itself from the acts of its general partner, Wilshire.

> In such circumstances, the court has no basis to hold that the Christopher Village Limited Partnership is not liable for the acts of the general partner Wilshire, and its ultimate owner AFC, especially because those acts were performed in concert with MAGI, which was both an affiliate of AFC and a limited partner in the Christopher Village project itself.

[6][7] These facts establish that plaintiffs committed a prior material breach of the HUD contracts, even though the U.S. government was not aware of the facts at the time of the foreclosure at issue in this litigation. It is well-settled that prior material breach excuses a subsequent breach by the government. "A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact." College Point Boat Corp. v. United States, 267 U.S. 12, 15, 45 S.Ct. 199, 69 L.Ed. 490 (1925). See also, Mega Constr. Co. v. United States, 29 Fed.Cl. 396, 421- 22 (1993) ("Any extant reasons supporting a default termination are sufficient to sustain the default, even if not known or discovered until after *190 the decision to terminate for default is made."). This court therefore finds that as a matter of law, the government was within its rights to not consider the request for rent increases in 1995 on the grounds that the rent increase requests were based in part on fraudulent certifications. Irrespective of plaintiffs' failure to properly maintain the property, plaintiffs' fraudulent conduct in any event would have justified the government's termination of the HUD

housing contracts. See generally Joseph Morton Co., Inc. v. United States, 757 F.2d 1273, 1277-79 (Fed.Cir.1985) ("It is settled law that a party can justify a termination if there existed at the time an adequate cause, even if then unknown.... [A]ny fraud warrants termination for default as a matter of law."). Thus, the fraudulent conduct of MAGI and Wilshire, in connection with the rent requests for the Mockingbird Run Apartments, constitutes a prior material breach of the HUD contracts which justifies HUD's termination of plaintiffs' contract for default.

D. Nothing in the Global Settlement Bars the Government's Reliance on the Defense of Prior Material Breach

[8] As described above, plaintiffs do not meaningfully contest that the actions of MAGI and Wilshire, taken in connection with the rent requests for Mockingbird Run Apartments, constitute a prior material breach of the contract between plaintiffs and HUD. [FN7] Instead, the plaintiffs argue that the "Global Settlement" reached in the MAGI litigation--the March 30, 2001 Consent Judgment issued by the U.S. District Court for the Northern District of California, the Administrative Agreement incorporated therein, and MAGI's March 30, 2001 Plea Agreement--bars the government's reliance on the facts demonstrating plaintiffs' breach to support the termination in this case.

FN7. See supra note 6.

To make this argument, plaintiffs rely on a declaration by Daniel S. Floyd, counsel to MAGI and the AFC defendants during the litigation in the California district court. According to Mr. Floyd:

> After more than three years of very strongly contested litigation between the Government and the AFC defendants, the parties began discussions in Fall 2000 to seek a global resolution of the pending litigation. On behalf of our clients, we communicated to the Government our insistence that any settlement be truly "global," and include resolution of the pending criminal investigation and, importantly, resolving any and all HUD administrative action that might result from a complete criminal and civil settlement. This was because, as we explained to HUD, the AFC Defendants did not want HUD to use the fact of the settlement to take administrative action against those HUD-assisted projects in which the AFC Defendants had involvement, no matter how minor. The only way to avoid this was to identify and agree on all the administrative consequences of the proposed civil and criminal settlement.... The $8.125 million civil payment was intended to compensate the Government in full for any alleged damages arising from the AFC Defendant's [sic] alleged practices relating to insurance and management fees.

The government counters that the terms of the Global Settlement do not bar the government from relying upon the existence of the fraudulent certifications to prove its defense from material breach. The court must agree. There is nothing in any of the documents associated with MAGI's plea that bars the government from relying upon the admitted acts of fraud in order to defend the breach

of contract claim. The Plea Agreement does not bar the government from relying upon it in a civil action, and the Administrative Agreement limits the United States' rights to "suspend and debar" Wilshire or to "seek civil money penalties ... for any conduct alleged as the basis for liability in the civil or criminal action, [or] for the financial defaults resulting in the foreclosure of HUD Properties prior to the date of this Agreement ...." Here, the government is not seeking any penalties, but defending itself from liability. Similarly, under the Consent Judgment, the government agreed to "release *191 all Defendants from any administrative monetary or civil monetary claim that the United States or HUD" had against them.

Thus, while the United States agreed to forego taking any further affirmative enforcement actions--to either seek further penalties or to continue to press affirmative suits--against Wilshire, the Global Settlement says nothing regarding the government's ability to defend itself from claims levied by parties involved in the action. For this reason, the court finds that the government's reliance upon the uncontroverted facts establishing plaintiffs' prior material breach, in order to defend itself against plaintiffs' action in this court, does not run afoul of the conditions of the Global Settlement.

III. CONCLUSION

Having decided that the government is not barred from defending itself against plaintiffs' breach of contract claims, the court finds that the government's termination of plaintiffs' HUD contracts was excused by plaintiffs' prior material breach, the fraudulent insurance scheme perpetrated

by MAGI, AFC, and Wilshire. As such, plaintiffs' August 2, 2001 motion for partial summary judgement as to liability is DENIED, and the government's March 8, 2002 cross-motion for summary judgment is GRANTED. No further proceedings are required in this matter, and the claim is hereby DISMISSED. Each party to bear its own costs.

53 Fed.Cl. 182

END OF DOCUMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

J. STEPHEN NAIL, and
INTERVEST CORPORATION,
PLAINTIFF

VS. **CIVIL ACTION NO.**
3:02-CV-299BN

THE HONORABLE MEL MARTINEZ,
SECRETARY of the United States Department
of Housing and Urban Development,
DEFENDANT

OPINION AND ORDER

This cause is before the Court on several related motions. Defendant filed a Motion to Dismiss, or in the Alternative, for Summary Judgment. In addition to filing a response to the Motion of

Defendant, Plaintiffs also filed a Motion for Summary Judgment. In addition to filing a response to the Motion of Plaintiffs, Defendant also filed a Motion to Strike several attachments to Motion of Plaintiffs for Summary Judgment. Having considered the Motions, Responses, Rebuttals, attachments to each, and supporting and opposing authority, the Court finds that the Motion of Defendant to Strike is well taken and should be granted. Additionally, the Motion of Defendant to Dismiss, or in the Alternative, for Summary Judgment, is not well taken and should be denied. Additionally, the Court finds that the Motion of Plaintiffs for Summary Judgment is well taken and should be granted.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff J. Stephen Nail ("Nail") is the owner, President, and Chief Executive Officer of Intervest Corporation ("Intervest"). Intervest manages over sixty properties, several of which are assisted through the Department of Housing and Urban Development ("HUD") or the Farmer's Home Administration ("FHA").

On January 12, 2001, HUD issued a proposed debarment notice to Nail, as President of Intervest, based in part on his alleged violations of the Regulatory Agreements and Housing Assistance Payments ("HAP") contracts governing two apartment complexes located in Mississippi. On March 8, 2001, HUD issued a proposed debarment notice to Intervest. On October 12, 2001, an informal hearing regarding the proposed debarments was held before the Debarring Official's Designee pursuant to 24 C.F.R. § 24.313. On January 2, 2002, the Debarring Official debarred

Nail and Intervest for a three year period. After the debarment, the FHA allegedly informed Plaintiffs that they would not be awarded any new management contracts, be allowed to develop new properties, or renew management contracts as they expired. Plaintiffs further allege that because of the debarment they are precluded from renewing expiring management contracts with HUD assisted properties.

On March 28, 2002, Plaintiffs filed a lawsuit in this Court seeking, *inter alia,* a declaratory judgment that they were illegally debarred by HUD and a mandatory injunction compelling HUD to restore them to good standing.

On June 10, 2002, this Court issued an Order denying the Motion of Plaintiffs for a Preliminary Injunction. Plaintiffs seek judicial review of an agency determination pursuant to the Administrative Procedure Act ("APA"), codified at 5 U.S.C. § 701 *et seq.* The Court has federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

On June 3, 2002, Defendant filed a Motion for Summary Judgment in this Court. On August 12, 2002, Plaintiff also filed a Motion for Summary Judgment. The two Motions for summary judgment rely on the same set of core facts.

II. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides, relevant part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. Clv. P. 56(c). The United States Supreme Court has held

that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also Moore v. Mississippi Valley State Univ., 871 F.2d 545, 549 (5th Cir. 1989); Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The movant need not, however, support the motion with materials that negate the opponent's claim. Id. As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that demonstrate an absence of evidence to support the non-moving party's claim. Id. at 323-24. The non-moving party must then go beyond the pleadings and designate"specific facts showing that there is a genuine issue for trial." Id. at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. It is improper for the district court to "resolve factual disputes by weighing conflicting evidence, . since it is the province of the jury to assess the probative value of the evidence." Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is also improper where the court merely believes it unlikely that the non-moving party will

prevail at trial. National Screen Serv. Corp. v. Poster Exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962).

III. ANALYSIS

Plaintiffs have brought this lawsuit to challenge the debarring official's determination that Plaintiffs should be debarred for a period of three years. Thus, Plaintiffs are seeking judicial review of an administrative decision. Such review is governed by 5 U.S.C. § 701, et seq.

The United States Court of Appeals for the Fourth Circuit has decided a case that is similar to the one before the Court. Therein, the Fourth Circuit summarized the standard of review appropriate for this type of case:

[The Court] reviews the debarment decision by HUD pursuant to the APA, under which the agency's decision must be upheld unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C.A. § 706(2)(A). "Under this narrow standard, we are not empowered to substitute [our] judgment for that of the agency." Wilson v. CHAMPUS, 65 F.3d 361, 364 (4th Cir. 1995)(internal quotation marks omitted) (alteration in original). Rather, our task is to determine "whether the agency conformed with controlling statutes, and whether the agency has committed a clear error of judgment." Id. (internal quotation marks omitted); see also Maryland Dep't. of Human Resources v. United States Dep't. of Agriculture, 976 F.2d 1462, 1475 (4th Cir. 1992).

Marshall v. Cuomo, 192 F.3d 473, 478 (4th Cir. 1999) (all marks in original).[1]

---

[1] Although Marshall is not binding, the Court adopts thelanguage quoted therein as the apprpriate

Additionally, in making its review, the Court "shall review the whole record or those parts of it cited by a party." 5 U.S.C. 706. Defendant has filed a Motion to Strike several attachments to the Motion of Plaintiff for Summary Judgment. Specifically, Defendant objects to "Affidavit of J. Steve Nail," as well as attachments A, F, G, H, I, and J. Defendant argues that these attachments are improper because they are not part of theadministrative record in this case. Plaintiffs have cited no reason for which the Court should examine evidence outside the administrative record. Accordingly, the Motion of Defendants to Strike should be granted.

Debarment proceedings were instituted against Plaintiffs primarily based on their involvement with two properties, Eastover Apartments ("Eastover") and Metro Manor Apartments ("Metro Manor"). Intervest managed both properties. Nail, in addition to his role as chief operating officer of Intervest, also served as a general partner of both Eastover Apartments, Ltd. and Metro Manor, Ltd., the limited partnerships which owned the respective properties.

HUD claims that Plaintiffs breached "several Regulatory Agreements into which they entered with HUD," pertaining to the two properties. Debarring Official's Determination, p. 2. HUD alleges that Plaintiffs "breached their contractual obligations to HUD by failing to maintain the two properties in good repair and condition
and in decent, safe and sanitary condition sic]." Debarring Official's Determination, p. 2. HUD also maintains that the contractual duties of Plaintiffs "were not conditioned on the level or adequacy of federal funding, and argue[s] that [Plaintiffs] were

---

standard of review for this case.

obligated to invest private funds to maintain the properties if the HUD subsidies proved insufficient." Debarring Official's Determination, p. 2.

An abundance of evidence indicates that the properties were in fact in deplorable condition. However, Plaintiffs contend that the deterioration of the properties was a result of various decisions made by HUD which prevented Plaintiffs from properly maintaining the properties. Plaintiffs claim that they presented a plan to fund the maintenance of the properties, but that HUD did not approve the plan. Thus, Plaintiffs claim that the cause of the deterioration of the properties is the failure of HUD to provide adequate funding with which to maintain the properties. Plaintiffs vigorously deny that they had any duty or obligation to invest private funds to properly maintain the properties when funds provided by HUD were insufficient.

The primary argument advanced by Plaintiffs is that the debarment decision is not in accordance with the law. The debarment decision concluded that "[t]he only issue in dispute is whether [Plaintiffs] had a duty to invest private funds to maintain Eastover and Metro Manor and failed to satisfy HUD's requirement to keep these complexes in good repair and condition and decent, safe and sanitary [sic]." Debarring Official's Determination, Conclusions, 1 3 . The debarring official went on to conclude that the properties in question "deteriorated...when [Plaintiffs] failedto invest private funds into the projects." Debarring Official's Determination, Conclusions, 1 6.

Plaintiffs argue that the conclusions of the debarring official are in direct contradiction to the decision of

the United States Court of Appeals for the Fifth Circuit in Christopher Village, L.P. v. Retsinas, 190 F.3d 310 (5th Cir. 1999). Plaintiffs quote the following language as support for their position:

Nothing in the National Housing Act, HUD's regulations, the Regulatory Agreement, or the HAP contract requires [Plaintiff], as a low income property owner, to absorb or subsidize operating and maintenance deficiencies. Instead, the programs are designed to ensure that HUD established rental rates so that property owners receive enough revenue to cover all of the property's expenses including maintenance, repairs, debt service, taxes, and a six percent return on investment.

Christopher Village, 190 F.3d at 316.

In essence, Plaintiffs argue that under Fifth Circuit precedent, Plaintiffs have no duty to invest private funds to maintain HUD properties. According to this argument, the decision of the debarring official is not in accordance with the law, and must be overturned upon review.

HUD disagrees with the interpretation of Christopher Village offered by Plaintiffs, and argues that Christopher Village is inapplicable to the present case. According to HUD, the holding in Christopher Village is only applicable to circumstances where HUD has failed to consider rent increases submitted by property owners. HUD distinguishes the present case by claiming that Plaintiffs herein have not presented any evidence indicating that HUD has failed to consider rent increases submitted by Plaintiffs.

Decisions of the Fifth Circuit are binding on this Court. Thus, a proper determination of the motions before the Court requires a more thorough understanding of the holding and rationale of the Fifth Circuit in Christopher Village.

A. CHRISTOPHER VILLAGE

The plaintiffs ("Village") in Christopher Village owned and managed Mockingbird Run Apartments ("Mockingbird"), a federally subsidized low income housing complex. Christopher Village, 190 F.3d at 311. The property was subject to a Regulatory Agreement and a HAP contract. Id. at 313. Over time, the condition of Mockingbird deteriorated to the point that approximately two million dollars was needed to restore and maintain the property in good condition. Id. at 313. After HUD warned Village that the condition of Mockingbird could constitute a default under the Regulatory Agreement, the two parties began negotiating plans to fund and repair Mockingbird. Id. at 313. Ultimately, HUD rejected all proposals that included funding repairs through rental

40

increases subsidized by HUD. Id. at 313. Instead, HUD insisted that Village fund the repairs privately. Id. at 313.

Because Village lacked the necessary revenues to operate Mockingbird and perform necessary maintenance and repairs, Village made a formal request for HUD to increase rent. Id. at 313. Rather than rule on the request, HUD sent plaintiffs a letter demanding that Village place the two million dollars needed for repairs in an escrow account. Id. at 313. HUD threatened that the failure of Village to comply would result in a default of the Regulatory Agreement. Id. at 313.

When Village failed to comply with the demand, HUD assumed control of the property as a mortgagee in possession, sold the property through a foreclosure sale, and transferred ownership to the city of Bryan, Texas. Id. at 313-14.

Village brought suit against HUD, arguing that the actions of HUD had made it impossible for Village to maintain the property because of insufficient rental revenues. Id. at 314. HUD responded that Village "had an absolute obligation to maintain the property regardless whether it received sufficient rents to cover repair costs." Id. at 314. Essentially, HUD argued that Village had a duty to use private funds to maintain the property,regardless the amount of money provided by HUD. The district court granted summary judgment in favor of HUD. Id. at 314.

On appeal, the Fifth Circuit summarized the arguments of the two parties:

Village argues that its obligation to maintain the property was dependent upon HUD's providing sufficient rent revenues to pay for maintenance. According to Village,...HUD acted arbitrarily and capriciously in citing poor maintenance as the reason for declaring Village in default. HUD counters that Village had an absolute duty to maintain the property, regardless of its rental income. This means that if Village's rental income was insufficient to pay all of its operating and maintenance costs, Village and its financial partners must either invest additional equity to make up any deficiencies or risk default and foreclosure.

Id. at 316.

Ultimately, the Fifth Circuit reversed the summary judgment. The Fifth Circuit held that "HUD acted arbitrarily and capriciously when it refused to abide

by its legal obligation to consider a rental increase request from a non-negligent owner." Id. at 319. The case was remanded to the district court with instructions that the district court issue a declaratory judgment in favor of Village.

In arriving its holding, the Fifth Circuit conducted a detailed analysis of the statutes and regulations that make up the regulatory scheme in question. The holding of the Fifth Circuit was predicated in large part on a finding that by refusing to consider the rental increase request from Village, HUD had "violated its contractual and regulatory duty." Id, at 316. The Fifth Circuit found that although Village "had the duty to maintain Mockingbird 'so as to provide decebt, safe and sanitary housing," that duty was not absolute. Significantly, the Fifth Circuit noted that "[n]othing in the National Housing Act, HUD's regulations, the Regulatory Agreement, or the HAP contract requires Village, as a low income property owner, to absorb or subsidize operating and maintenance deficiencies." Id. at 316. Instead, "the HUD reimbursement scheme resembles cost-plus contracts or public utility regulation, in either of which situations the private party who performs the work is assured of recovering reasonably incurred costs as well as a reasonable return on investments." Id. at 316.

The Fifth Circuit found that the HUD reimbursement scheme clearly contemplated that "the cost of operating and maintaining the property, in addition to the cost of complying with the Regulatory Agreement, must be paid for out of the regulated rental revenues." Id. at 316-17. The interplay of HUD regulations, the requirements that property owners maintain the property with no source of income other than rental revenues, and the use of a non-recourse note loan to purchase the

properties, "makes clear that all of the expenses of operating and maintaining a low income housing project must be paid out of the rental revenues, which in turn are subsidized by HUD. The regulatory scheme does not contemplate that property owners must bear the risk of maintaining the properties based on insufficient rental revenues." Id. at 317.

The decision of the Fifth Circuit clearly places a duty on HUD to adequately subsidize property owners. However, the duty of HUD is also not absolute:

HUD could understandably refuse to provide financial assistance to an owner that has misappropriated funds, mismanaged the property, taken a profit instead of maintaining the property, or been negligent in its management in some other regard. When those elements are absent, however, the statutes provide that HUD must ensure that the owner receives rents sufficient to meet at least the operating and maintenance expenses of the property. There is no statutory or regulatory basis for imposing on a conscientious low-income housing operator the risk of uncompensated dilapidation or deterioration; the federal government, not the private contractor, is charged with funding the public program.

Id. at 317-18.

B. THE IMPACT OF CHRISTOPHER VILLAGE ON THE CASE SUB JUDICE

The issues present in this case are similar to those in Christopher Village. Here, Plaintiffs were debarred because they "failed to keep the Eastover and Metro Manor in good repair and condition and decent safe and sanitary [sic] which meant that they needed to

invest private funds in addition to HUD subsidy into these projects to avoid their complete deterioration." Debarring Official's Determination, Conclusions, 1 10. Like the plaintiffs in Christopher Village, Nail and Intervest claim that HUD failed to provide the funds necessary to meet the operating and maintenance expenses of the property. Under binding Fifth Circuit precedent, HUD has a duty to provide such expenses, absent a showing that the property owner has somehow been negligent in his management of the property. There may be evidence of mismanagement or negligence in the administrative record that would provide grounds for debarment. However, Defendants have not directed the Court to any such evidence. Furthermore, the Debarring Official's Determination does not assert any act of mismanagement or negligence on behalf of Plaintiffs. Instead, the Debarring Official's Determination expressly bases its conclusions on the failure of Plaintiffs to invest private funds.
In Christopher Village, HUD failed to rule on a request by the plaintiffs for a rent increase. The record does not indicate whether a similar situation exists in the suit before the Court. Regardless, the Court does not find this to be a material distinction under the circumstances presented. Christopher Village clearly states that there is no requirement that property owners must invest private funds in order to maintain properties such as Eastover and Metro Manor. HUD has debarred Plaintiffs herein for their failure to invest private funds to maintain the Eastover and Metro Manor properties.
Therefore, the Court finds that the decision by HUD to debar Plaintiffs was arbitrary and capricious, and not in accordance with the law. Accordingly, the Motion of Plaintiffs for Summary Judgment should be granted.

Plaintiffs request that the Court set aside the debarment order, rather than remand the case for additional debarring procedures by HUD.[2] Defendant did not address the issue of whether the case should be remanded. As stated above, there is an abundance of evidence that the Metro Manor and Eastover properties were in fact in deplorable condition. It may be that Plaintiffs mismanaged the properties through negligence or otherwise. However, HUD based the decision to debar Plaintiffs on grounds of Plaintiffs' failure to invest private funds. Christopher Village provided notice that debarment order based on such grounds was uncertain at best. HUD is not now entitled to return to the administrative law procedures for a second bite at the apple simply because it chose an unsound legal theory on which to proceed.

[2]The Court clearly has the authority to set aside the debarment order. "The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."5 .S.C. 706(2)(A). Accordingly, the Court finds that the debarment order should be set aside without a remand for further administrative proceedings.

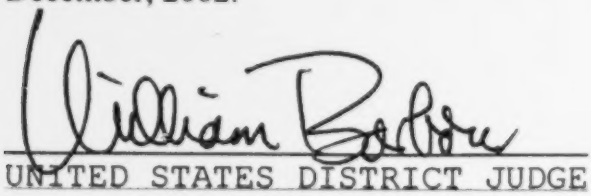
IV. CONCLUSION

IT IS THEREFORE ORDERED that the Motion of Defendant to Strike [26-1] be granted.

IS FURTHER ORDERED that the Motion of Defendant to Dismiss, or in the Alternative, for Summary Judgment [9-1, 9-2], be denied.

IT IS FURTHER ORDERED that the Motion of Plaintiffs for Summary Judgment [23-1] is hereby granted. A final judgment will be issued this day setting aside the Order of debarment.

SO ORDERED this the 2nd day of December, 2002.



UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX VOLUME I
(Plaintiffs'-Appellants' Submissions)

10. Notes of ABC 9/19/94 Interview of Helen Dunlap, Deputy Assistant Secretary for Housing, Department of Housing and Urban Development

Telephone Interview 9/19/94 of Helen Dunlap by Jackie Judd from ABC

PRESENT POLICY

HUD now emphasizes enforcement of HAP contract (S8) and Regulatory Agreement on projects owners.

If owners not willing or able to provide funds for repairs, HUD will abate S8 subsidy on units not meeting HQS, seek mortgagee-in-possession, acquire title through foreclosure or deed in-lieu and convey to community based non-profits which have the capacity to deal with the needs of the real estate and the residents.

11. Letter of September 18, 1995 from Castillo to Jones Re: Change in Policy

U.S. Department of Housing and Urban Development
San Antonio Office, Region VI
Washington Square
800 Dolorosa
San Antonio, Texas 78207-4563

September 18, 1995

Ms. Debbie O. Jones
District Manager
Insignia Management Group
1828 Swift, Suite 200
North Kansas City, Missouri 64117

SUBJECT: Project #115-44168
Bergstrom Arms Apartments
Del Valle, Texas

Dear Ms. Jones:

Thank you for your letter dated September 1, 1995, concerning your request for a rent increase for the Bergstrom Arms Apartments. We have reviewed your request and the documentation you provided and have determined that a modest increase is justified based primarily on general increases in operating increases.

Upon reviewing your request, we noticed that a large capital improvement plan was proposed. In your request, your plan was to fund

the improvements through a rent increase over the next two years. The plan was estimated to cost approximately $305,067, of which $219,234 would come from a proposed special rent increase. We regret to inform you that due to a recent change in policy, HUD will no longer approve rent increases for capital improvements. The directive was issued on March 22, 1995 by Helen Dunlap, Deputy Assistant Secretary for Multifamily Housing Programs.

As a possible alternative, HUD is in the process Of initiating a Comprehensive Needs Assessment Program. Recent action by Congress, specifically Title VI of the Housing and Community Act of 1994, has mandated that HUD require certain kinds of housing projects submit a Comprehensive Needs Assessment. Your property appears to meet the profile for the type of property required to participate in the CAN Program.

If you desire additional information, please contact our Supply Distribution Branch at 800-767-7468 and ask for Notice H-95-27, Comprehensive Needs Assessments – CNA Initial Surveys. There is no charge for this notice.

In regard to your rent increase request, the effective date of the rent increase is November 1, 1995. The annual potential basic rental income is increased from $479,688 to $496,056. The annual potential market rental income is

increased from $540,912 to $549,984. The approved basic rents, and market rents, are listed below:

Unit Size	Basic Rent	Market Rent
1 BR	$361	$400
2 BR	$431	$478
3 BR	$505	$560

Presently, there are no Section 8 funds available to fund the proposed rent increase. The implementation of the rent increase is left to the discretion of the management agent and the owner(s). We have requested additional Section 8 funds, but we do not know if and when funds will be provided. Therefore, a statement will be required from the Owner indicating that he is in receipt of this letter and that should the rent increase be implemented before Section 8 funds are provided, the owner will be responsible for shortfalls if amendatory Section 8 funds are delayed or not forthcoming.

You are authorized to implement the increased rents effective November 1, 1994, subject to the following conditions: (1) give each tenant a 30 day advance written notice of the increase and the effective date thereof, (2) amend the tenant leases and applications in accordance with paragraphs 4-5 and 5-10 of HUD handbook 4350.3 and (3) submit the statement required in the above paragraph.

Enclosed are four (4) copies of form HUD-92458, Rental Schedule. Please complete all sections, sign, and return all four forms for our

final review. After final approval is given, the HUD-92458 will become the revised Exhibit "A" and "C" to the Housing Assistance Contract, (HAP).

If you may have any questions, please contact Tom Romero, Multifamily Asset Manager or me, at (210)229-6831.

Sincerely,

s/Elva Castillo
Elva Castillo
Chief
Asset Management Branch

12. E-mail of November 10, 1995 from Helen M. Dunlap to Monica Sussman, et al.

From: Helen M. Dunlap at FHCPOST3 11/20/95 5:38PM
(6174 bytes: 98ln)
To: Geoffrey L. Patton at OGCPOST, Monica H. Sussman at OGCPOST,
CC: ALBERT J. CASON at HOUPOST,
Gloria M. Aldridge at HOUPOST,
William V. Cerbone at FTWPOST,
JOHN W. HEROLD at OGCPOST,
Herbert L. Goldblatt at OGCPOST, Albert V. Sullivan
Subject: Re: Mockingbird Run

Message Contents

A status report.

As you know, HUD is scheduled to take MIP on this project
On December 1. Before that date, we are under court order to negotiate in good faith a resolution of the owner's CNA and plan of action which calls for about $2,000,000 in repairs. After December 1, we are obligated to negotiate in good faith a plan under which the owner can regain possession. A meeting was held at the Houston Office on November 2, during which four proposals were discussed
in general, with no commitments being made by either side.
As I understand them, these proposals are as follows:

1. HUD will forego taking MIP on December 1 if the owner agrees to put $500,000 into the project over a period of three years to help fund the repairs. The remaining $1,500,000 needed to pay for repairs would come from HUD, but no specific source of funding was identified. Also, HUD would forgive approximately $267,000 in mortgage indebtedness and approve a rent schedule that will support full mortgage payments including the full cost of the repairs, i.e. both the owner's cost and HUD's. you must be kidding. we don't do this any more and have no source. how many owners who we have forced into foreclosure this year would scream unfair.

13. Letter of February 23, 1996, from Albert Cason, Director of Multifamily Housing for the Houston Area Office, United States Department of Housingand Urban Development, to Deane Earl Ross

In response to your letter of January 23, we note that it challenges our "continued insistence that the owner is the source of funding for the Replacement Reserve Account." Our position, more accurately stated, is merely that the owner must maintain the project in "good repair and condition", as required by the Regulatory Agreement. This obligation is absolute. It is not conditioned on the availability of rental income, funds in the Replacement Reserve Accounts, government subsidies, or any other source of cash.

Thus, our goal in the negotiations has been to arrive at a plan by which the owner can fulfill its obligations to the project by paying for needed repairs, and not merely arranging for full funding of the Replacement Reserve Accounts. Inasmuch as Mr. Sullivan's memorandum only addresses funding of the Replace Reserve Account, of a project in good standing, it is not relevant to the sole focus of our discussions. In other words, were we dealing with a project that was not in technical and/or financial default, unlike Mockingbird Run, HUD would not expect or require an additional infusion of cash from the owner. However, in this case, the project is in both technical and financial default.

You are asking HUD to bear the entire cost of in excess of $2 million in repairs, and then turn the project back over to the very ownership which created the need for the extraordinary repairs by its mismanagement. Even your proposal to "infuse" $500,000 of owner funds is disingenuous

inasmuch as you would have HUD reimburse the owner in full through increased rent subsidies. In order to protect public funds, that is something we simply cannot and will not do. Therefore, we believe our position is soundly based on policy and is not capricious, arbitrary, or illegal.

Your reference to Mark to Market is also noted. As per our negotiations, this was a pilot demonstration program, not yet established by regulation, directed toward properties that were financially current and in good physical repair. Mark to Market is not available to assigned properties.

We sincerely believe we have at all times acted in good faith during our negotiations and we surely are concerned that a just and equitable resolution be reached for the benefit of all parties, especially the residents. Should you have new proposals for us to consider, we will be happy to review them and set up another meeting to continue our negotiations. Please contact me at 713-834-3474, Extension 7063.

Very sincerely yours,

s/Albert Cason
Albert Cason, Director
Multifamily Housing